No. 11547

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

RAINIER BREWING COMPANY,
A Corporation,

Respondent.

Transcript of Record

In Five Volumes

Volume II

Pages 191 to 604

Upon Petitions to Review a Decision of the Tax Court of the United States.

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CORNELIUS G. WEBER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name?

The Witness: Cornelius G. Weber, with one "b."

By Mr. Mackay:

Q. Mr. Weber, what is your occupation?

A. I am an engineer and appraiser.

Q. Are you a graduate engineer?

A. I am a graduate from the University of Wisconsin in 1908.

Q. What is your present occupation? [170]

A. I am associated with the American Appraisal Company in Milwaukee, Wisconsin.

Q. How long have you been associated with the American Appraisal Company of Milwaukee, Wisconsin? A. Since the latter part of 1922.

Q. During that time what have been your duties as such an employee?

A. I have worked primarily on special engineering problems and in evaluation of intangibles of various kinds such as patents, water power rights, good will, and—well, a very considerable variety of special reports of all kinds for mergers, and so forth; court testimony.

I have testified in court in a considerable num-

(Testimony of Cornelius G. Weber.)

ber of cases, including three for the Federal government, one before the Interstate Commerce Commission in connection with the Pullman Company, a patent case against New York Rapid Transit Company; that is, the Cincinnati Car Company against the New York Rapid Transit Company. A patent case in the General Tire & Rubber Company and United States Rubber Company.

I have prepared—oh, I think well over two hundred reports of different kinds for companies during that time. I have made valuations of properties for the government, fair market values for the government, and I have pending now a case where I expect I will be called to testify for the government [171] on the fair market value of a property.

I have a very extensive list here of any special kind of jobs that I have done, classified, and if you could care to have me read from that, I can mention some of those.

Q. I would appreciate it. I think it would give some idea particularly of the good will, of fair market value of other intangibles, including trade names.

A. I have a list here of thirty-nine which cover good will, fair market value or other intangibles. It would be kind of lengthy to read these all. It includes five laundries for the United States government, and H. H. Robertson Company of Pittsburgh, Pennsylvania, Motor Master Corporation in Chicago, National Refining Company in——

Mr. Neblett: Your Honor please, we would like

(Testimony of Cornelius G. Weber.)

to have the dates of some of these appraisals as he goes along, if he could give that to us.

The Witness: I have not put the dates on here. This is over the entire period since 1922. Some of these dates I might recall within reasonable limits, but I could not give you all of these dates as I did not think it was necessary to have each one. I would be glad to furnish them later on, if I could.

The Court: That is all right. Just proceed, will you please? But, Mr. Weber, counsel for the Petitioner in this proceeding wants you to state what your experience has [172] been and you are too general. You say that you have done a great many jobs in the valuation of intangibles, and then you have been reading off a few names of large concerns. That does not give the Court any idea of what those jobs were, or what you did or why you did it.

I will try this for a few minutes, and then, Mr. Mackay, I think probably you will have to ask Mr. Weber questions to show his qualifications.

Mr. Mackay: Yes. I appreciate your Honor's suggestion.

The Witness: I made fair market value reports on breweries. For instance, Joseph Schlitz Brewing Company. I recall that. That was in 1923. That was after prohibition.

The Court: That would be a valuation of tangible property, would it not?

The Witness: Yes. That is tangible property, that's right.

(Testimony of Cornelius G. Weber.)

I have made a fair market value for sales purposes of Birk Brewing, Inc., of Long Island City, New York.

I am making, and have made, preparatory to testimony, stock valuation for a large brewery in the Middle West. I don't know whether I would be free to give the name until the case comes up.

I have made a fair market value appraisal of the United States Brewing Company in Chicago, Illinois. [173]

By Mr. Mackay:

Q. Does that involve intangibles, such as good will and trade name?

A. Yes, sir. That involves intangibles broadly, without segregating it into any components, just merely the intangibles over and above what the physical assets were worth and which are termed "good will," as it is generally understood in appraisal practice.

I have made tangible property valuations of the Willow Springs Brewing Company, Omaha, Nebraska; Cream City Brewing Company of Milwaukee; North American Brewing Company, Chicago; Dobler Brewing Company, Albany, New York; Birk Bros. Brewing Company, Chicago; Hass Brewing Company, Hancock, Michigan——

Q. Pardon me. I don't want to interrupt you, but are these just including physical property valuations or also intangibles?

A. These are primarily physical property valuations.

(Testimony of Cornelius G. Weber.)

Rheinlander Brewing Company, Rheinlander, Wisconsin; Schmidt Brewing Company, Detroit, Michigan; South Bend Beverage & Ice Association, South Bend, Indiana; Eckert & Becker, Detroit, Michigan; and I think there were a few others.

I did not put everything down on my list, but in reports on fair market value and good will I have a whole lot of other kinds of enterprises besides breweries. [174]

The Frogwich Manufacturing Company at Carlisle, Pennsylvania, for sales purposes.

Coca Cola Bottling Company of Cincinnati, Ohio, and also the Coca Cola Bottling Company of Cleveland, Ohio, and that, as I recall it, was in connection with some stock matters.

H. H. Robertson Company of Pittsgurgh, Pennsylvania, on account of some reorganization.

Rite-Rite Corporation of Chicago; that was for financing.

Trico Fuse Company, Milwaukee, Wisconsin, for merger purposes.

Oscar Nebel, a hosiery mill. I don't recall the purpose. That was quite some time ago.

Q. Did that involve a good will valuation, too?

A. Yes. These are all market value or good will valuations.

Vacuum Can Company, Chicago, for financing.

Grayberg Oil Company, San Antonio, Texas. That was for financing.

American Metal Products Company, Milwaukee, Wisconsin. That was for financing.

(Testimony of Cornelius G. Weber.)

Gray C. Smith Restaurant in Toledo, for financing.

Lancaster Eagle in Lancaster, Ohio and Lancaster Gasket in Lancaster, Ohio, for sales purposes evaluation; circulation [175] and good will.

National Tennesseean, circulation and good will, which is the equivalent of good will in the newspaper business.

Hurd Lock Company, Detroit, for sales purposes.

Motor Master Corporation in Chicago, for financing.

Superior Paper Products Company, Pittsburgh, Pennsylvania, for sales purposes.

Hudson Manufacturing, Minneapolis, Minnesota, and that was in connection with a law suit.

Illinois Clay Products Company, Joliet, Illinois. I don't recall the purpose of that. That was some time ago.

National Refining Company, Muskegon, Michigan; contemplated sales purposes.

Mr. Mackay: If your Honor please, if I might interrupt, I know the witness can take up a lot of time to show many, many more. I don't want to impose upon the Court in going into that. I think so far as I am concerned he has gone just about far enough on that, unless your Honor would care to hear some more about it.

The Court: No.

By Mr. Mackay:

Q. May I ask you another question, Mr. Weber? I think you stated that you testified for the United States government in respect to certain laundries.

(Testimony of Cornelius G. Weber.)

A. I did not testify with the laundries. I made valuations of the laundries, fair market values.

Q. They included good will values?

A. They included everything.

Oh, I take that back. They don't include the good will value. They include the value of the property for sale or for rent, what you take them over for or sell them for.

Q. Mr. Weber, if you have just one or two more outstanding valuations that you made, particularly of good will and intangibles, I would like to hear it, but I think we ought to shorten it as much as we can.

A. Well, I think I have combed over about two-thirds of the list of the good will valuations.

I have mentioned the breweries. I have five distilleries. I have made valuations of capital stock for a good many clients, and that of course involves largely the principles and the features that go into the valuation of good will.

Estate of Alice Chaplin, Newark Car Wheel Company, Estate of J. W. Sanders,—he is a cotton mill operator, with about six or seven cotton mills down in the South. Rock River Cotton Works, J. H. Williams Drop Forge Company in Buffalo, which is a very large corporation; Micro-Switch Corporation of Freeport, Illinois, Nitrogen Company at Milwaukee, [177] Duff Norton Manufacturing Company, Pittsburgh, Pressed Steel Car Company, Pittsburgh. The State of Utah; I made some valu-

(Testimony of Cornelius G. Weber.)

ations for the State of Utah in connection with a——

Q. Mr. Weber, I forgot to ask: Where is your office?

A. Well, our main office is in Milwaukee, Wisconsin, but we have over twenty offices in——

Q. Where are your headquarters?

A. Mine is in Milwaukee, Wisconsin.

Q. You have offices all over the United States, of course?

A. We have. We have here, and in Los Angeles, and so forth.

Q. Aside from your activity here since 1922 in representing the American Appraisal Company in making appraisals, as you have testified, for commercial transactions and other purposes, are you also connected with a brewery?

A. Yes, I am.

Q. How long have you been connected with the brewing business?

A. Well, I suppose I might say ever since I was born. My grandfather took over a brewery in 1853. That later passed on to my father, and after prohibition we—that is, prior to my father's death we incorporated and we never dissolved the corporation during the prohibition period. We [177] hung onto our trade name, "Pioneer Beer," kept the roof's repaired, and so forth, and in 1933 we rebuilt and started up again.

Q. Are you still operating that brewery?

A. We are still operating this brewery, yes, sir.

The Court: Now we will recess for lunch until 2:00 o'clock.

(Whereupon, at 12:30 P.M., a recess was taken until 2:00 P.M. of the same date.) [179]

Afternoon Session, 2:15 p. m.

CORNELIUS G. WEBER

resumed his testimony as follows:

Direct Examination—(Resumed)

The Court: Do you want the last question and answer read?

Mr. Mackay: No. I think I remember.

By Mr. Mackay:

Q. Mr. Weber, I think when we adjourned for noon you had just stated your experience in a brewery.

Have you had any experience with respect to construction of breweries?

A. I have. I mentioned before I am a graduate engineer from the University of Wisconsin. For a time I worked for a public utility company, and then I spent half a year reconstructing my father's brewery, and after that I went with a firm of consulting engineers rehabilitating and reconstructing paper mills, rubber mills, food concerns, woodworking concerns, and so forth.

I came West in 1912 and was Superintendent of Motor Power for the Cottonwood Coal Company, and I also worked with the Great Falls Power Com-

(Testimony of Cornelius G. Weber.)

pany under Mr. Hovens, who is now President of the Anaconda Copper Company.

In 1914 I had an offer from Milwaukee, a distant [180] relative of mine who is the head of a brewers' institute. They conduct a brewing academy called the Hantke Brewers School, in which they had a model brewery, part of which I constructed and designed. They gave courses in scientific brewing, and I lectured in engineering and at the same time I was given the opportunity to develop a practice in brewery engineering.

I had a retainer from the Cream City Brewing Company, one of the large breweries in Milwaukee, and I redesigned and reconstructed a good part of that brewery. I did work for the Popelgiller Brewing Company, the Rainier Brewing Company and the Independent Brewing Company in Milwaukee. This was in 1914.

The field looked pretty good at that time, to me, and that was why I went into it at that time. I visited all the breweries in Detroit, Minneapolis and St. Paul, and a good many others during that time, and in 1916 I severed my connections because at that time things did not look as favorable as they had in 1914 when I went into this business.

I went back then into consulting engineering with the same firm I had been with before, and I wrote technical articles in connection with my work for a magazine, "Power," "Electrical World," "Coal Age," and one or two others. One was a paper magazine.

(Testimony of Cornelius G. Weber.)

After the depression in 1921 I came with the American [181] Appraisal Company, as I said before, in 1922. During the time I was in consulting practice, I was a full member in the American Institute of Electrical Engineers. I gave that up when I went into the appraisal field, but I am a registered professional engineer in Wisconsin, and that leads me up to the time I went with the American Appraisal Company, and we were discussing before some of the kinds of work that I have done.

Q. Mr. Weber, have you made an appraisal of the good will inherent in the trade name "Rainier" applicable to the State of Washington and the Territory of Alaska at March 1, 1913?

A. I have.

Q. In making that appraisal, what investigations did you make?

A. Well, I made a rather extensive investigation into the past, some of my own experiences around that time, many of which I recall very well. I have gone into many historical records and data that are pertinent as of that time, and I took into account, amongst the other things, four major factors.

One was the outlook for the industry, the brewing industry in general. The next was the outlook for the Pacific enterprise, the Seattle Brewing & Malting Company, and the status it had attained. I went exhaustively into [182] the profits, that is, the operating statements, balance sheets, where the profits were derived from, trends in the business,

(Testimony of Cornelius G. Weber.)

and, from various sources, made comparisons with other breweries at that time and breweries at this time, what the stocks were selling for, and so forth, and what might reasonably have been royalties had the beer at that time—or, the sale of beer in Washington been placed on a royalty basis.

So, taking up these various broader angles in order, I will say that personally in 1914, the outlook was good enough, from my standpoint, to decide definitely to go into brewing engineering, which I did, and pursued for two years.

At that time (in 1911, in fact) this was when we even rebuilt our own brewery. I know from personal experience that ever since I was a child there was always this controversy up and down, up and down. It never seemed to get anywhere. It was just like "Wolf! Wolf! Wolf!" never came.

But, to supplement my own recollections, I dug into some of the history of the period. Well, I found that the State of Maine was the first one to go dry. It was in 1843, but even that State did not remain permanently dry. In the 50's it reversed itself for two years, but then later on again became dry. But, there was a very definite prohibition wave in the early 50's. In 1852 Minnesota, Rhode Island, [183] Massachusetts and Vermont went dry. In 1853 even Wisconsin went dry, although in Wisconsin it was either vetoed or there was some unconstitutionality about it, that it did not remain in that category.

In 1854 Connecticut went dry. In 1855 Indiana,

(Testimony of Cornelius G. Weber.)

Delaware, Iowa, Nebraska, New York and New Hampshire went dry. Then there was a sudden halt in 1856.

By the middle of the Civil War only five of the thirteen states which had gone dry in the 50's remained dry, and within twelve years three of these went wet.

Then there was a gap there. There wasn't much going on.

But, in the 80's, there was another wave. Seven states had voted on the question. Of the seven states that voted on the question, all but North Carolina voted dry.

From 1886 to 1897, fourteen states voted, but only the sparsely settled states of North and South Dakota went dry.

This brings us up to about—well, to 1906, and by 1906 there were only three dry states left after this long period of agitation and ups and downs. These states were Kansas, Maine and North Dakota.

In 1907 to 1909 there was another wave, and six more states went dry; Georgia and Oklahoma in 1907, Mississippi, Alabama and North Carolina in 1908, Tennessee in 1909, [184] but Alabama reversed itself again in 1911, and in 1912 West Virginia went dry.

All of these states that went dry during that last wave were all southern states. There wasn't any one of the states north of the Mason and Dixon line.

It seems to me that there is quite a precedent there, that after these ups and downs and ups and

(Testimony of Cornelius G. Weber.)

downs, and especially since none of the subsequent waves ever reached the crest of the first one, that one would be well justified in believing it was the continuity of the cry of "Wolf! Wolf!" I know we felt that way about it.

But, I went into the matter further. I cast about for literature. I found some up in the Seattle Library where, in the history of prohibition in the State, it winds up that they are faced with the same controversy that existed fifty-seven years ago. But, I found a book that was written by D. Leigh Colvin, Ph.D. Mr. Colvin in 1920 was a candidate for Vice-President on the Prohibition ticket, and the book he wrote was called "Prohibition in the United States." It is a book—including the appendix, it has 655 pages.

But, there are some very significant statements in this book, and I won't burden the Court with going into it exhaustively, although it is very much to the point, especially from pages 373 to 377 inclusive. [185]

After discussing the matter of local option and its effects, Mr. Colvin states, on page 373, as follows:

> "Local option was subject to such continuous and sometimes violent fluctuations and reactions that instead of being a step toward prohibition, it frequently led in the opposite direction. The earlier waves and recessions in a number of states have been referred to. There remains to be studied the period preceding

(Testimony of Cornelius G. Weber.)

1914. A study follows, comparing the number of dry counties in the different states in 1914 with the number in 1918."

Then it continues, and there is a gap there. I am not reading that unless I am requested to do so.

Mr. Neblet: If your Honor please, may I ask, for the purpose of the record, the date of this book that you are reading from?

The Witness: 1926, it was published. I will give you the publisher. George H. Doran Company, copyright 1926.

Mr. Neblett: Your Honor please, based on the ground that this book shows as copyrighted in 1926, it is objected to. The basic factor with respect to the issue is what a man standing on the ground on March 1, 1913, would have paid for this right. This book was gotten out thirteen years later. It is "hind sight," so to speak, from beginning to end. Based on that ground the respondent objects to the witness using that book, which was not gotten out contemporaneously. [186]

Your Honor please, respondent would not have objected to this book, particularly if it had been written in 1912 or 1913, but the witness certainly should not be allowed to take data accumulated in that fashion thirteen years later, and put into the record a book we know contemporaneously was without the basic period.

Mr. Mackay: Your Honor please, it seems to me an outstanding authority on prohibition, as this man

(Testimony of Cornelius G. Weber.)

evidently is, if he is giving a history of prohibition, as the witness has said he is doing, all we are trying to show is the condition as it existed in 1913. That is what the witness is directing the Court's attention to. It is the history there, as he shows it, at the period involved here. It seems to me it is quite competent. How else would we ever find this out otherwise? It may be the history of the United States itself written some time after, but certainly they go into the events current at that particular time, and one may refer to history to show what our forefathers did, where the Civil War happened, and all that, it seems to me, would be included in that background.

The Court: Objection overruled.

You may go ahead.

The Witness: Continuing the quote:

> "The results show that in ten states there was a decrease in the number of dry counties. In three, Ohio, [187] Indiana and Oregon, there was a very decided falling off from the previous years."

Then there is a part which I am not reading, but this is available if it is desired.

Here is another quote:

> "Other recessions were Illinois, thirty-six to thirty-three; Missouri, seventy-seven to seventy-four; Colorado, eleven to ten; California, five to one, and Washington, ten to six."

(Testimony of Cornelius G. Weber.)

Then I am skipping almost two pages.

"From this survey the conclusion is inevitable that the effect of local option as a step to state prohibition prior to the time of the concerted movement toward national prohibition was negligible. Local option as a method had reached its maximum and was beginning its decline prior to 1914. The predominant trend in the local option states was in the direct opposite to prohibition. The step away from prohibition was still more accentuated in the cities. Of the thirty-one cities in the non-prohibition states having a popoulation of over 25,000, which at some time prior to 1908 and 1912 were under local no-license, only twelve were able to maintain a continuous no-license policy until 1914. Nineteen of the thirty-one swung back to the saloon. Three of them subsequently oscillated back again to no-license, but sixteen of the thirty-one remained wet until state or national [188] prohibition was achieved.

"The striking fact is that, outside of Massachusetts, only three cities of over 25,000 in all of the non-prohibition states of the whole country maintained a no-license policy for any length of time."

There is still more, but I am not going to burden you with any more.

Mr. Mackay: Mr. Neblett, if you want a photostatic copy of that, we will be glad to furnish it.

Mr. Neblett: Just keep the book available. It

(Testimony of Cornelius G. Weber.)

really shows that the man who wrote the book was a bad prophet.

Mr. Mackay: I was just trying to be nice!

The Witness: Here is a quotation from the September, 1914, issue of the "Western Brewer." It is headed, "Vice-President Marshall on the National Prohibition Amendment."

> "The prohibition amendment will not pass. The central government has too much power already. Of course, such an amendment, that carries with it property destruction, will not be approved by Congress. Suppose it were possible——"

Mr. Neblett: Just a minute. Could I have the witness identify for the record what he is reading from and when it was written?

The Witness: September, 1914, issue of the "Western Brewer." [189]

Mr. Neblett: September what?

The Witness: 1914 edition of the "Western Brewer."

Mr. Neblett: 1940 or '14, did you say?

The Witness: '14.

Mr. Neblett: Yes.

The Witness: What was the last, please, before the last quote?

The Reporter: "Of course, such an amendment, that carries with it property destruction, will not be approved by Congress."

The Witness: "Suppose it were possible for

(Testimony of Cornelius G. Weber.)

such a foolish amendment to be attached to the nation's constitution, what would become of the millions of dollars invested in liquor industries, or of the hundreds of thousands of persons working in such trades, and who would pay in to the Federal government $250,000,000 which it now collects in taxes from the liquor interests?"

That is part of the story. It is reasonable to assume, it seems to me, that brewers, and people connected with the industry, would be the ones most concerned with this controversial question. I don't believe that anyone would be so imprudent as to deliberately ride into the face of a prohibition wave if he felt that there was any wave like that on the move, instead of an actual ebb, at that time. [190]

People may have their opinions pro and con, but I think an opinion is pretty well fortified when it carries with it a very heavy commitment of money.

I have here for the year 1912, fifty-four pages of photostats; for the year 1913, thirty-three pages, and 1914, thirty-six pages, which are predominantly —I would estimate seventy-five per cent filled with brewery construction news that goes back to that time, the building of new breweries, the expansion of breweries, the organization of new breweries, and of course, it would take hours to go through all of this. I have condensed and marked but a few of the many items of what was going on.

Mr. Neblett: Your Honor please, for the purpose of the record, may we ask the witness if the

(Testimony of Cornelius G. Weber.)

testimony he is now going to give pertains to the State of Washington or the Territory of Alaska?

The Witness: Washington primarily, the West generally, the outlook of the brewing industry in general, and I would take into consideration California and other states, but I can give construction news from Washington, isolated from other states. For example:

"January, 1912. Walla Walla Brewing Company renovated and remodeled the old Stahl Brewery at a cost of more than $70,000, including new building and machinery."

"February, 1912. Seattle Brewing & Malting Company [191] will shortly have plans prepared for the construction of additional storage cellars."

"May, 1912. North Yakima Brewing & Malting Company, extensive improvements in plant and additional machinery."

Angelus Brewing & Malting Company, Walla Walla Brewing: there are different ones here I haven't marked, and I am not reading, but I am coming again now to September 12, Washington.

"Orville Brewing & Malting Company, new brewery incorporation, $15,000."

"Independent Brewing Company, Seattle, is increasing its cellar capacity and having additional storage capacity equipped with direct expansion and new lighting."

"Seattle Brewing & Malting Company has awarded the contracts for extensive improvements and additions to its plant. The plans call for a two-

(Testimony of Cornelius G. Weber.)

story building and a four-story building, additions to the ice plant and storage cellars. Total cost, $50,000. This company is also erecting a brick storage depot and agency building at Great Falls, Montana. The building is 20 feet by 45 feet, and partly two-stories."

"October, 1912. Walla Walla Brewing Company addition to bottling house and new office."

"October, 1912. Seattle Brewing & Malting Company has commenced work on the improvement of the Rainier Brewery, [192] which will mean the expenditure of approximately $110,000 when completed. The stockhouse and racking room are being enlarged, and will increase the annual capacity of the plant by 30,000 barrels. The other improvements consist of an additional boiler room, a large brick smokestack and a hop storage house, an ice machine with a capacity of 400 tons will be installed, and also two 400-horsepower boilers."

"November, 1912. Pacific Brewing & Malting Company, Tacoma, will spend more than $25,000 in improvements, including a large brick addition.

"December, 1912. Seattle Brewing & Malting Company has purchased ground 111x160 feet for $13,000.

"Independent Brewing Company, Seattle, has been granted a building permit for the construction of a two-story brick power house, has placed an order for a 95-ton refrigerating machine.

"Pohle & Ernst, Chewelah, resumed operations.

(Testimony of Cornelius G. Weber.)

The capacity has been doubled and refrigerating machines have been added."

"January, 1913. Olympia Brewing Company has placed order for new coolers using ammonia as a cooling medium."

"Spokane Brewing & Malting Company has secured a building permit for a new brick and concrete bottling plant to replace the present plant. Cost, $22,000.

"Inland Brewing & Malting Company, Spokane, has [193] placed an order for eleven 245-barrel glass-lined tanks.

"Inland Brewing & Malting Company, Spokane, is erecting one of the finest stock cellars in the West, brick and steel construction, four stories high, to accommodate eleven glass-lined tanks and nine wooden fermenters. Cost when completed, $100,000. Also placed an order for a hundred-barrel pasteurizer."

"January, 1914. Seattle Brewing & Malting Company reported they have plans drawn for four-story building to be used by its cooperage department and bottling plant."

"February, 1914. North Yakima Brewing & Malting Company will spend a considerable sum of money in increasing capacity and otherwise improving its plant."

"April, 1914. Seattle Brewing & Malting Company has installed a new 350-barrel copper kettle with rotating heating coil, Newmark equipment, 350 barrel capacity, and a hop strainer."

(Testimony of Cornelius G. Weber.)

"Independent Brewing Company, Seattle, has been making some improvements in its brewery, in which they will install a large filter and pump."

"July, 1914. Seattle Brewing & Malting Company purchased two parcels of land 30x160 feet. It is expected that the company will add to its building."

"Pacific Brewing & Malting Company has some work."

That finishes what I have got in here, and Washington, [194] there is a whole lot more in there.

Oregon: May, 1912; August, 1913; January, 1913. There are three items there.

California.

"January, 1912. English Ale Brewing Company, Los Angeles, incorporated for $50,000."

"Perrin-Knos Brewing Company, Martinez, recently organized to erect a new brewery to cost $50,000."

"April, 1912. Bay City Brewing Company, San Diego. There is a picture in the 'Western Brewer,' and descriptive article in the April issue showing the new 30,000 barrel brewery of the company to be ready for operation January 1, 1913. Plant to have 150-barrel kettle."

"July, 1912. Ackerman Brewing Company, San Francisco, will erect a new brewery."

"August, 1912. Maier Brewing Company, Los Angeles, has acquired a creamery plant adjoining its plant, and will reconstruct it as a bottling house, cold storage and stable."

(Testimony of Cornelius G. Weber.)

"September, 1912. Golden West Brewing Company, Oakland. Picture and descriptive article on page 124, of new 40,000 barrel brewery."

"Bakersfield Brewing Company and Union Brewing Company are making some changes and additions."

"October, 1912. Jackson Brewing Company, San Francisco, is greatly improving its plant. Malt House will be [195] enlarged and a new brew house, storage cellar, power plant, garage and office will be erected. A complete bottling plant with a capacity of 150 barrels a day will be added.

"Bay City Brewing Company, San Diego, is under roof, and installation of equipment has commenced. It has a good-sized brewery right in the midst of construction there."

"June, 1913. United Consumers Brewing Company, San Francisco, a new $1,500,000 corporation."

"October, 1913. Mathies Brewing Company, Los Angeles, ordered twenty-four 245-barrel glass-lined tanks and sixteen 136-barrel fermenters."

"November, 1913. Mathies Brewing Company, Los Angeles, will make alterations and erect an addition to its plant. Cost, $24,000."

"December, 1913. Maier Brewing Company, Los Angeles, commenced construction work on its new fireproof brew house. Estimated cost, $100,000."

Montana.

"June, 1912. Billings Brewing Company will erect a branch plant at Roundup, cost, $75,000."

"April. Montana Brewing Company, Great Falls,

will erect new bottling house, install a new mash machine, 150 barrel mash tub, and an ice machine."

Idaho.

"April, 1912. Sunset Brewing Company, Wallace, has [196] put its first brew on the market made in its new plant which was built to take the place of the old brewery which was destroyed by forest fires in August, 1910. The plant represents an expenditure of $75,000, and is much larger than the old one. The brew kettle has a capacity of 100 barrels.

"Coeur d'Alene Brewing Company plant of the defunct Coeur d'Alene Brewing Company, closed for about two years, was sold to A. Fisher of Spokane, Washington, for $125,000. $40,000 is to be spent for improvements, including a 100-ton ice machine and complete bottling department."

Colorado.

"Walter Brewing Company, Pueblo, will erect a new stock house, a new office building, and will otherwise improve the plant. Total cost $150,000."

Wyoming.

"October, 1912. The Casper Brewing Company is rapidly completing th erection of its complete new brewery, which is estimated would cost about $80,000."

"May, 1912. Anheuser-Busch Brewing Association of St. Louis, Missouri, will improve its Salt Lake City branch by the erection of an additional building to be used as bottle department and storage house."

"August, 1912. Lemp Brewing Company of St.

(Testimony of Cornelius G. Weber.)

Louis, Missouri, will build a branch bottling and distributing plant at Salt Lake City. Cost, $75,000."

Nevada.

"January, 1913. Carson City Brewing Company is enlarging its plant. The brew house is being thoroughly renovated, and new machinery is being added. The power plant is being improved, and a bottling department will be installed."

South Dakota.

By Mr. Mackay:

Q. Mr. Weber, I hate to interrupt you, but don't you think you could summarize the rest without going into all the rest of it?

A. Just let me read two more items.

Q. All right.

A. "Sioux Falls, South Dakota, new $500,000 brewery is to be erected in Sioux Falls."

There is one more here.

Wisconsin.

> "August, 1912. The William Rahr Sons Company, Manitowish. Illustrative descriptive article relating to addition to malt house representing 2,200,000 bushels increased capacity, to make a total capacity of 4,200,000 bushels per annum."

Then I have here a list of newly incorporated breweries, but it is very voluminous, all of this stuff. You could go on for a whole day if you read all the items. [198]

There are some heavy commitments, and presum-

(Testimony of Cornelius G. Weber.)

ably backers must have subscribed to some of these things. Irrespective of the controversy, it seems to me that the people closest to this thing, and who were spending their good money, definitely did not believe in the early coming of prohibition. Furthermore, if they were ready and willing to spend their money for physical property, I think it is quite reasonable to think that those same people would have been in the market for buying good will or buying a good business. The market is right there, irrespective of what one side of the controversy thought in contrast to what the other side thought, and personally, I am very much convinced that you could not any more read prohibition was in the offing than we could read in the fall of 1941 that we were going to fight Japan. We had warnings. I recall that Kaltenborn (I am sure he was one of them) a year or two before said that some day we would fight Japan. It came in a hurry. Neville Chamberlain predicted "peace in our time." He was wrong. War followed soon after.

Q. Mr. Weber, is it your opinion that prohibition was not in the offing, then, in January?

A. That is my conclusion from this, that the industry had a very favorable outlook, because it just had been going on, and that is the conclusion.

Q. Mr. Weber, you made an investigation. Will you [199] tell the Court what was the total outlay that the Seattle Brewing & Malting Company had made in 1913 and '14 in respect to plant expansion and equipment? A. Yes. I have that.

(Testimony of Cornelius G. Weber.)

During the year ended June, 1913, the company spent $224,783.63, and in the following year, $167,-217.81, or a total of $392,001.44 in plant expansion.

Q. Did that increase their capacity? Do you know how much?

A. Well, I would judge that it might have increased, that is, increased their brewing capacity about fifty per cent, and with the stock cellars brought into balance, it probably would have increased the plant capacity about fifty per cent.

Q. I think you covered the prohibition factor sufficiently there, Mr. Weber.

What other factors did you take into consideration?

A. Well, the outlook for the Seattle Brewing & Malting Company. From the time they started, they had a most favorable record of gross and earnings. That could be traced by years. I have the figures, but picking it up even just during the short period before 1913, '08, '09, '10, '11 and '12, during that period the sales in barrels total were as follows, to even barrels, not including fractions:

1908, 260,803; 1909, 245,190; 1910, 266,135; 1911, [200] 289,570; 1912, 309,811.

The dollar sales, the even dollars, were as follows:

1908, $2,169,353; 1909, $2,091,570; 1910, $2,321,-822; 1911, $2,596,459; 1912, $2,873,603.

Q. May I interrupt here, Mr. Weber?

You were furnished, were you, the balance sheets of the Seattle Brewing & Malting Company for a period? A. I was.

(Testimony of Cornelius G. Weber.)

Q. I call your attention to Exhibit 13, and will ask you if that is a copy of the exhibit that you had seen.

A. Well, some of the basic figures there are so familiar to me now that I don't know if it is necessary to make much of a check there. I can see pretty well that it is the same thing.

Q. May I put it this way?

With respect to the balance sheet profit and loss statement from which you took the figures given by you—— A. That is the same thing, I am sure.

Q. It is? A. Yes.

Q. You can say the same thing with respect to the profit and loss statement here, Exhibit 14?

A. If these are the same ones that I looked at with Mr. Bennion a minute ago, they are the same things.

Q. And also the statement of loss, which is Exhibit 13, [201] the one Mr. Bennion showed you? You checked them before the Court came in?

A. Yes, sir. Those are the ones.

Q. And also Exhibit 7. I think you checked that also. You furnished that one, didn't you?

A. Those are the same ones as these (indicating documents).

Q. And the comparisons given in those, the barrels that you have read here, the comparisons given in those that you read are the same as these here?

A. Yes.

Q. All right. Go ahead.

A. Now, in the country in general, the United

(Testimony of Cornelius G. Weber.)

States, beer production has gone forward almost unbrokenly from 1863, the first year for which records were available, until 1913, and the production of beer per capita had gone from roughly a sixth of a barrel per capita to about two-thirds of a barrel. In chart form, the population trend in the United States and the beer production trend would be as indicated by a chart which I have prepared.

The Seattle Brewing & Malting Company, by comparison with the output of beer in the State of Washington, that is, all the beer produced by the State of Washington, represented the following approximate percentages of the total during the years 1908 to '13, inclusive. [202]

1908, 29½ per cent; 1909, 28.7 per cent; 1910, 31½ per cent; 1911, 33 per cent, 1912, 36.2 per cent, and 1913, 39½ per cent.

So that, in comparison to other breweries it was capturing more trade than the other breweries in the State of Washington.

They had another favorable trend. In the brewing business now, as back in 1913, it was more profitable to sell bottled beer than to sell keg beer, and every brewer was endeavoring to sell as much bottled beer as possible and increase the ratio of bottled beer to total output. So, the percentage of bottled beer to total sales was as follows, in barrels:

In 1908, 10.6 per cent; 1909, 11.3 per cent; 1910, 12.6 per cent; 1911, 14.5 per cent; 1912, 17.5 per cent.

In dollars, it was as follows:

In 1908, 30.8 per cent; 1909, 26.9 per cent; 1910,

(Testimony of Cornelius G. Weber.)

29.4 per cent; 1911, 33 per cent, and 1912, 37.8 per cent.

Then, the net profit per barrel went up during that time. I had better give it by years.

Net profit on keg beer:

1908, $1.06; 1909, $1.00; 1910, $.85; 1911, $.85; 1912, $.94.

Bottle beer:

1908, $4.45; 1909, $4.22; 1910, $4.27; 1911, $4.58; [203] 1912, $4.15.

Weighted average:

1908, $1.42; 1909, $1.36; 1910, $1.28; 1911, $1.39; 1912, $1.50.

Those trends were all favorable, profits were favorable, the brewery was in very favorable condition to meet almost any price wars, or anything. In fact, it had grown to be the biggest institution of its kind west of the Rocky Mountains, and my conclusion is, definitely were in a very favorable position.

So, we come now to another matter, the sales and profits in the State of Washington as compared to outside business. The business in the State of Washington you might call a "close to home" territory, of course, and that usually is the most desirable business. It can be watched better, and is largely conducted with the retailer instead of through far-away agencies, and so forth, and it is therefore the cream of the trade. It was so in this case, as it is in most other cases. The result is that the price received per barrel for beer in Washington was on

(Testimony of Cornelius G. Weber.)

a materially higher level than the price received from outside of the State.

While the sales costs in Washington were somewhat higher on account of being largely retail, directly to the retailers, the margin in Washington was considerably greater than outside of the State of Washington. The prices received [204] per barrel for beer during 1908 and 1912 were as follows:

I have this tabulated across this way (indicating on document), "Washington" and then "Other" and then "Averages."

Is it practicable for me to give it that way?

The Reporter: Yes, certainly.

The Witness: This would be in line then.

	"Washington	Outside of Washington	Weighted Average Price Received
"1908	$9.03	$7.13	$8.32
1909	9.36	6.92	8.53
1910	9.68	6.97	8.72
1911	10.18	7.03	8.97
1912	10.80	7.37	9.28"

Then we come to the net profit per barrel. I had, from the exhibits, the gross profits per barrel from within and without the State of Washington. As a practical man in the business, I think I am able to make a proper allocation of the administrative and selling expenses as between within Washington and outside of Washington.

Ordinarily, in delivering bottled beer, bottled beer takes up more space than keg beer, which would work against it from the selling standpoint—or, the

(Testimony of Cornelius G. Weber.)

delivery standpoint, I mean. But, it was much easier to sell bottled beer back at that time than it was to sell keg beer, less sales resistance. Furthermore, in warm weather, long deliveries of keg beer required icing, which would work against [205] that.

So, when all of these factors are measured one against the other, it is my belief that the selling and administrative costs per barrel were just about the same thing, and for all practical purposes can be figured the same. Therefore, it is just a matter of deducting the selling and administrative costs from the gross profits on the same basis, and I arrive at the following net profits per barrel.

From beer sold within the State of Washington:

1908, $1.804; 1909, $1.846; 1910, $1.757; 1911, $1.834; 1912, $2.057..

Outside of Washington:

1908, $.791; 1909, $.435; 1910, $.407; 1911, $.685; 1912, $.807.

The weighted average was:

1908, $1.422; 1909, $1.365; 1910, $1.283; 1911, $1.393; 1912, $1.501.

That brings us to the profits that were made on a unit basis from within and without the State of Washington, and it is very evident that the bulk of the profit came from the "cream" or local business.

The matter of how much investment was required to produce these profits, I have taken from these exhibits the figures of net worth as represented by capital and surplus, [206] but these balance sheets

(Testimony of Cornelius G. Weber.)

show certain items of good will and organization expense, and inasmuch as the purpose here is to estimate a value for good will, I have eliminated that item from the balance sheet for analysis purposes in order to obtain an idea or a figure of the book net worth of the tangible assets.

In addition to organization expense and good will on the balance sheet, there were items of investment from which was separate income, which I have eliminated in order to bring the figures to represent purely the net worth of the tangible assets devoted to beer sales, and I have arrived at an adjusted net worth as follows:

The year 1908, $2,338,567.43; 1909, $2,466,144.21; 1910, $2,558,439.20; 1911, $2,734,916.97; 1912, $2,903,028.06.

Here has been a growth of net property invested in the business, and it also has been a growth of sales and a growth of profits.

In the case of a business in which there is not very much growth, or it is up and down and up and down, one is often justified in looking at five-year average results more or less in the abstract sense, as so many dollars of profit by years, but in the case of a growing enterprise or a falling or declining enterprise, I believe it is more indicative of a trend to measure the net profit against the net investment, because that really defines the progress that [207] has been made.

To illustrate the point further, just assume for the sake of argument that a company earned $100,00

(Testimony of Cornelius G. Weber.)

five years ago, $80,000 four years ago, $60,000 three years ago, $40,000 two years ago, $20,000 one year ago—or, the last year, rather. The average would be $60,000.

Assume there were another company that made $20,000 five years ago then $40,000, then $60,000, then $80,000 and then $100,000. The average would also be $60,000.

It seems very obvious that you would not treat those two averages alike and say, "Well, here are two companies. They have each made $60,000," and therefore value them the same.

So therefore, measuring the profit against net worth as adjusted, here are the figures:

1908, 15.09 per cent; 1909, 13.58 per cent; 1910, 13.38 per cent; 1911, 14.75 per cent; 1912, 5.98 per cent.

There is a fair degree of uniformity. There are some slight variations over that entire period, and a very decided upward trend in the last three years.

We are concerned here with the good will in the State of Washington. It therefore becomes a matter of determining what percentage of the net assets are reasonably assignable to the State of Washington, because it would have been entirely practicable, if anybody would have made an [208] attractive proposition to buy the good will in Washington, to make arrangements to get the beer brewed right in

(Testimony of Cornelius G. Weber.)

the same brewery. As a matter of fact, in our own little plant we had an arrangement of just that kind. A private individual wanted beer under his own name and under his own labels. He sent us the labels. We made a deal with him, made beer for him, and he sold the beer under his own label.

So therefore, the assets, the tangible assets assignable to the business in Washington would not be the entire brewery property, but only such portion as would be required to produce the beer sold in that State and Alaska.

I have taken from the balance sheets and the other relevant exhibits for the property in Washington, and I know from experience that the brewery plant itself would be allocable on the basis of barrels sold. Irrespective of the price you receive, the amount of tangible fixed property assignable to that business would be on a barrel basis. Inventory and accounts payable would be on a similar basis, because the inventory is controlled by the barrel output, and the accounts payable and accruals are on a barrel output. Accounts receivable, they are on a dollar basis, so I have allocated them on a dollar basis.

Then, adding these all up, I get that for the fiscal year ended in 1912, June 30th, that the total net assets assignable to the business in Washington would be $1,691,368. [209]

I had considered, however, another factor which was based on a somewhat different premise, that is, if the brewery itself had been down to the size for

(Testimony of Cornelius G. Weber.)

the business in the State of Washington, and in that connection had assumed that a smaller brewery would cost somewhat more per barrel, and instead of using $1,691,368, I have used the round sum figure of $1,750,000 as the net tangible assets assignable to the business in Washington.

For the production of profits as they then existed —and I will restate here: I don't believe I have stated them at all—the net profits and the tangible assets assignable to such profits over the period 1908 to 1912, are as follows:

1908. Net tangible assets, $1,550,000. Net profit from the State of Washington, $293,353.43.

1909. Net tangible assets, $1,710,000. Net profit, State of Washington, $298,387.90.

1910. Net tangible assets, $1,712,500. Net profit, $303,160.48.

1911. Net tangible assets, $1,735,000. Net profit from the State of Washington, $326,880.82.

1912. Net tangible assets, $1,750,000. Net profit from the State of Washington, $353,693.04.

The net profits to the net tangible assets for this [210] period are then as follows:

1908, 18.9 per cent; 1909, 17.57 per cent; 1910, 17.67 per cent; 1911, 18.85 per cent; 1912, 20.12 per cent.

From the above and other indications from this expanding and evermore profitable company, I firmly believe that currently and prospectively one would conservatively figure that they had reached a status such that they could expect a 20 per cent re-

(Testimony of Cornelius G. Weber.)

turn on $1,750,000 of net tangible assets assignable to the State of Washington, or a profit of $350,000 a year.

Under an average condition, if they had looked into the future, which would mean it is up one year, down a little bit, and up, but the steadiness with which this thing has gone and built up—well, as a matter of fact, I searched in Moody's and Poor's Manuals of Industrials in '13, '14, '12, and in there there are a good many brewery statistics listed, and I have found nothing comparable. Even a big brewery like Pabst Brewing Company in Milwaukee, which was expanding at that time, none of those breweries were making 6 per cent on their tangible investment, and a good many were down; and I made a very, very careful search. The big ones all had of course big investments, and the dollar profits were substantial figures, but against the investments there was just nothing that I could find that compares with this situation. If there are any, they are not published, but [211] they were just not to be found.

So—well, I am inclined to believe that this is a unique situation which was developed here by the Seattle Brewing & Malting Company, and I can believe, from the fact that they have gotten prizes at World's Fairs, which after all, isn't a small thing —you just can't make any old thing and get a prize—I think that all of those factors put together made for a very, very favorable situation.

(Testimony of Cornelius G. Weber.)

So, that is my general conclusion as to the status that they had reached.

By Mr. Mackay:

Q. Mr. Weber, having determined your so-called "net worth" and your prospective earnings, what did you do then?

A. I also gave some consideration to what would have been a reasonable royalty at that time if anybody could have gone and taken this on a royalty basis. A profit of $1 to $1.25 a barrel in those days was considered very good, and at the present time is a pretty good profit because when you make a profit of from $1 to $1.25, you pay a fair return, as a rule, on your tangible assets.

Now, if these people reach a status where they are making $2 a barrel in the State of Washington, even if I would take the upper limit of $1.25, $.75 a barrel, the same amount that they started off with in 1940, would be quite a consistent royalty basis back in 1913, because here was the [212] $2, and if you are going to make $1, $1.25, you could, for that kind of business, pay $.75 a barrel royalty and come out in good shape.

So, I had considered that that would pretty well tie up with 1913, just about the same situation as they had later in 1914.

Then of course I considered that if 172,000 barrels a year, which is about what they sold in Washington, the status they had attained in 1913, that were sold on a royalty basis of $.75—I mean, a roy-

(Testimony of Cornelius G. Weber.)

alty of $129,000 a year, that would be a mean royalty.

So, from all of these foregoing and other considerations, I made an estimate of the value of the good will of the Seattle Brewing & Malting Company as of March 1, 1913.

Q. What in your opinion was a fair market value of March 1, 1913, for good will inherent in the trade name "Rainier" as then associated with the products of Seattle Brewing & Malting Company as sold in the State of Washington and Territory of Alaska?

Mr. Neblett: Your Honor please, that question is objected to on the ground it does not include the necessary facts on which to base a hypothetical opinion. There is nothing here to show that this witness knows what was included in the so-called "good will" of Seattle Brewing & Malting Company as of March 1, 1913. [213]

Mr. Mackay: If your Honor please——

The Court: Mr. Mackay, I am going to sustain the objection, and ask you, if you can, to ask the usual question. I expect you wanted to save time.

Mr. Mackay: Yes, I did.

The Court: The question is usually asked in a different form.

Mr. Mackay: Yes, I appreciate that. I will reframe the question.

By Mr. Mackay:

Q. Mr. Weber, taking into consideration the balance sheets of the Seattle Brewing & Malting

(Testimony of Cornelius G. Weber.)

Company for the period from 1908 to 1912, ending June 30th, in each one of those years, and also the income and profit statements of the company, the outlook for the industry in general, and all the other factors that you have taken into consideration here, that you have talked about, have you an opinion as to the March 1, 1913, value of the trade name "Rainier" in the State of Washington.

A. I have an opinion.

Mr. Mackay: If your Honor please, may we take a little recess? There is one part of the pleadings I want to study and call your Honor's attention to.

The Court: I have them before me right now.

All right, we will take a short recess. [214]

(Short recess.)

Mr. Mackay: I would like to withdraw the last two questions, if your Honor please.

By Mr. Mackay:

Q. Mr. Weber, I think that you have stated that you arrived at a net worth of $1,750,000 for the State of Washington and the Territory of Alaska at March 1, 1913? A. Yes, I did.

Q. And that the earning capacity of the company at that time was about $350,000?

A. That's right.

Q. In arriving at your value, what did you do from there?

A. Well, the first thing I did, the first test I made was to see about what would be a profit that

(Testimony of Cornelius G. Weber.)

would reasonably satisfy $1,750,000 of tangible assets, and I believe that 10 per cent on tangible assets, especially in view of the fact that no breweries that I could find were earning any such percentage, yet were expanding and building, that that would be a very conservative figure. That would mean that $175,000 a year of earnings would be necessary to satisfy the tangible assets assignable to the State of Washington and Territory of Alaska. Deducting that from $350,000 leaves $175,000 in excess of the amount necessary to satisfy the tangible assets. [215]

Then I considered the capitalization rate of 16 2/3 per cent, or a multiplier of 6, would be fairly indicative of what you could assign to the good will in this trade name as associated with the product, and multiplied $175,000 by 6, and I get $1,050,000 as one indicator.

I next made a rather extensive study of stocks that were selling back in 1913, stocks reflected as good will in certain companies.

Mr. Neblett: Your Honor please, at this point could I ask the witness a question just to clear up the record?

You gave the figure "$1,050,000." What was that figure supposed to represent, Mr. Weber?

The Witness: Well, that is one figure that I am considering in arriving at my conclusion. That is, it is one test as to where that value might reasonably strike, or in the neighborhood of what figure it might reasonably strike.

(Testimony of Cornelius G. Weber.)

Mr. Neblett: Your Honor please, what I am trying to determine, that answer would not show an opinion with respect to the value of the good will, was it or not?

The Witness: Well, it is close to the opinion, but not the final round opinion that I have formed.

Mr. Neblett: Your Honor please, respondent moves to strike the testimony. We could not anticipate that answer or that conclusion from what he previously said, and as I understand [216] it, the motion to strike is equivalent to an objection. The witness has not shown himself qualified to answer any hypothetical question based on all the testimony in this case.

As I understand it, a hypothetical question must assume the truth of the evidence in the record, and it must be based on all the testimony in the case. There is nothing here to show that this witness is at all familiar with the various factors of this case at this point. Furthermore, there is no showing as to what part of the witness' total value of good will is attributable to the State of Washington and the Territory of Alaska. There is no basis or showing as to the witness' allocation of tangible assets and net profits devoted to the business in the State of Washington and the Territory of Alaska, either of which, your Honor, is fatal to a hypothetical question.

Mr. Mackay: If your Honor please, as I view it, the hypothetical question just based upon all the evidence in the record is objectionable. The witness

(Testimony of Cornelius G. Weber.)

has taken a long time here to show what he has done in his investigation, how he arrived at what he has taken into consideration, which has been based upon the financial records which are in the record. It seems to me that he ought to be permitted to testify from these things which he has already identified. He has already told your Honor with respect to the balance [217] sheets, which are Exhibit 13, for the years 1907 to 1912, and also the statement of income and earned surplus for the same period, which is Exhibit 14, and also Exhibit 15, which is the statement of sales costs of goods and gross profit on sales for the years ended 1908 to 1912, and all afternoon he has been saying that, based upon these, he has arrived at his values. It seems to me the witness ought to be able to testify at least upon the conditions of things he has testified to he has come to that value. If we haven't sufficient in there, of course that is our outlook, but I was very careful to have him, as he went along here, state what investigation he made, what information he found in arriving at that value, and I think it is quite proper for the witness now, having testified that way and showing the factors he took into consideration, to give an opinion as to the fair market value upon those factors he did take into consideration.

The Court: My understanding is that the witness has made a very extensive analysis, in accordance with his own method; and it has been extensive, there isn't any question about that. However, he appears to have been basing his opinion very

(Testimony of Cornelius G. Weber.)

largely upon an analysis of the balance sheets and the earnings record of the business before and at the time of the date of valuation.

I understood the witness to say that he allocated [218] assets of the entire business to what he called the "Washington business," and that he arrived at a figure which he was using in his method of finally coming to the value that is to be determined, he had used the figure of $1,750,000 as the value of net tangible assets assignable to the business in Washington.

Isn't that correct?

The Witness: That's correct, yes.

The Court: And the figure was $1,750,000.

The Witness: Allocated to Washington.

The Court: Then I understood the witness to say that it is his opinion that the value of the good will of the business is large, and that it almost approximates the value of the business' going business. That part of his testimony I think he has not finished, and that part of his testimony is not clear.

I thought that the witness was at this point going to explain now his method in arriving at the fair market value of good will.

Mr. Mackay: Yes, that is what I wanted him to bring out.

The Court: I think that I must deny the motion to strike, but I do think, Mr. Mackay, that you could assist the witness in pointing up his testimony at this point, because we listened to all of this very carefully, to his long dissertation [219] and his

(Testimony of Cornelius G. Weber.)

detailed dissertation, and I myself do not know where the witness is going. I think you certainly should ask him a question which he can either express an opinion on now, and then explain it, or you perhaps should ask him a question which will at least, for the record, summarize the elements that he was asked to consider, which I understand he has considered, and which I think the record will show he has considered.

I think the form of a hypothetical question is a good form, because it does summarize the elements that the witness has been asked to give his chief attention to.

Mr. Mackay: Thank you, your Honor. I shall do that.

By Mr. Mackay:

Q. Mr. Weber, you have stated that you had assigned a net worth, I think, a value of tangibles to the State of Washington of $1,750,000. Did I understand you properly? A. That's right.

Q. Was that determination or assignment that you made based upon the three exhibits you now have, which are 13, 14 and——

A. There is another exhibit.

Q. ——13, 14 and 15?

A. I think there is another exhibit, the one that shows the allocation of property. [220]

Q. Oh, yes. Exhibit 27.

A. Yes. On this here (indicating on exhibit).

(Testimony of Cornelius G. Weber.)

Q. You are speaking about Exhibit 27, are you not?

A. That's right, Exhibit 27, and Exhibit 13, Exhibit 14 and Exhibit 15, yes, sir.

Q. So, all your values of three and seven, the figures one and three million and fifty thousand were taken from the record? A. Yes.

The Court: What was the total figure of the whole business that would compare to your figure of $1,750,000?

The Witness: After the elimination of investments and the item of good will and organization expense, the adjusted net worth at 1912 would be $2,903,028.06, and out of that amount I have allocated $1,750,000 to the business emenating from the State of Washington and the Territory of Alaska.

The Court: Has the witness yet expressed an opinion as to the fair market value on March 1, 1913, of the good will of the business in the State of Washington and Alaska?

Mr. Mackay: Not yet. That is what I was just coming to, your Honor.

The Court: For the entire business, was good will carried on the books as an asset? [221]

The Witness: It was carried as an asset.

The Court: Those balance sheets that you have, I suppose they give you a figure as of the end of the accounting period for 1912. Were they on a calendar year basis?

The Witness: It is on a fiscal year basis; June

(Testimony of Cornelius G. Weber.)

30, 1912. That was the last one previous to the basic date.

Mr. Mackay: I might state, your Honor, there is an exhibit here which shows that for 1911—we are coming to his figures, anyway. Withdraw that.

By Mr. Mackay:

Q. Mr. Weber, you have testified that you made an investigation to determine the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier," as then associated with the products of the Seattle Brewing & Malting Company, and sold in the State of Washington, Territory of Alaska? A. Yes, sir.

Q. I think you have also stated that you took as your basic information the financial records of the company, which have been put in here in evidence as exhibits. You have gone over that twice now, and we know in the record what the numbers of those exhibits are.

From those financial statements and records, you have made certain deductions and arrived at a net worth of tangible assets in the State of Washington of $1,750,000. [222] A. That's right.

Q. You have also testified that you have taken into consideration the conditions as you found them to exist in 1913 with respect to the prospects of prohibition or other factors that may have had an adverse effect upon the brewery industry in the State of Washington, and that you also have taken into consideration the business trends at that particular

(Testimony of Cornelius G. Weber.)

time, in particular the trends of the business of the Seattle Brewing & Malting Company.

Now, taking all those things into consideration, Mr. Weber, what in your opinion was the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier" as then associated with the products of Seattle Brewing & Malting Company as sold in the State of Washington and Territory of Alaska?

Mr. Neblett: Your Honor please, the question is objected to, and the form of the question is objected to in addition to its content. A hypothetical question, your Honor, is supposed to give the opposing counsel something to attack, to see precisely what the witness based his conclusion on, the factors that he took into consideration.

At this stage of the proceeding, your Honor, we are not in a position to do that based on the hypothetical question when that has just been asked this witness. As a matter of fact, your Honor, Mr. Wigmore says that a hypothetical [223] question is such a confusing question that it is sometimes a good policy for counsel propounding the hypothetical question to write it out in advance and submit it to the opposing counsel for consideration, which is a very fine thing to do. Then it obviates confusion.

We say that the witness has not shown what is the basis on which the allocation is made for the State of Washington and Territory of Alaska. After all, what is he valuing? We don't know at this stage of the proceeding what the witness is

(Testimony of Cornelius G. Weber.)

valuing as far as the State of Washington and the Territory of Alaska are concerned.

The Court: The witness has explained the steps that he followed in such detail that it has been hard to keep in mind everything that he has said, but I believe he testified that he made an analysis of the earnings of the business and the sales in the State of Washington, and that on the basis of the volume of business done in the State of Washington, he arrived at a percentage or a ratio which he thought was fair to apply in allocating tangible assets to the State of Washington as his first step in forming his opinion as to the fair market value of good will in the business in the State of Washington.

So I think, Mr. Neblett, that I don't quite understand your objection. Mr. Mackay did not resort to the hypothetical question. If he had done that, he would have [224] propounded a long hypothetical question to the witness at the beginning of his testimony, and the witness would have immediately expressed his opinion, and then, as is customary in these cases, counsel for respondent would have objected and possibly would have said that he objected as to the qualifications of the witness. But, he would have made practically the same objection then as he is making now.

I have never yet heard counsel in tax cases accept either the question or the testimony of the expert as being free from fault. That apparently is part of our own system in the trial of cases to establish a value that has been proved. However that may be,

(Testimony of Cornelius G. Weber.)

the method Mr. Mackay has followed, as I understand it, is to ask the witness first to state what analysis he made in preparation for forming his own opinion as to the fair market value of the good will, and the witness has taken us step by step to the point where he is now going to express his opinion. I think that procedure is usually preferable to the other one of preparing the long hypothetical question and then having the witness backtrack and explain how he arrived at his opinion.

It seems to me that the evidence which is represented by the exhibits, the numbers of which have just recently been stated for the record, is the main evidence now [225] in the record which this witness certainly would have to consider.

Is it part of your objection that the witness has not considered the evidence now in the record fully, or have you in mind some evidence that he should have considered?

We have a great many exhibits. We have twenty-nine exhibits, and as I recall the nature of those exhibits, there are a great many of them that this witness won't have to take into consideration in arriving at his opinion.

Mr. Neblett: For example, your Honor, Exhibit 24, to be specific, says "Net Tangible Assets, 1912, $2,903,028.06."

The Court: That is for the whole business.

Mr. Neblett: Yes. What is the basis on which the allocation is made?

The Court: I think I have been following the

(Testimony of Cornelius G. Weber.)

testimony clearly. I think I know the basis on which the allocation was made.

Let me ask the witness as best he can if he will just clear this point up for us. But, Mr. Weber, please do not repeat your testimony. It would take too long.

How did you make your allocation of tangible assets in the business assignment made to the business in Washington which resulted in your figure of $1,750,000?

The Witness: I took the ratio, the percentage [226] ratio of the number of barrels sold in Washington to the total, and I distributed the fixed assets, the accounts payable and the inventory on that basis.

The Court: Have you your working figures there? What percentage did you use? We have a total figure.

The Witness: It was 55.5 per cent basically, and as I think I explained, later I rounded out the figure and increased it from the purely mathematical number of a million six hundred and ninety-odd thousand that developed, and it is in one of these exhibits. This would be part of it. It would be the brewery company.

The Court: You are now referring to what exhibit?

The Witness: I am referring to Exhibit No. 27, from which I took the property in the State of Washington, the fixed property.

The Court: One difficulty that we are having,

(Testimony of Cornelius G. Weber.)

Mr. Weber, is that it would be very much better if you would take a pad of paper and a pencil, and if you would take the figure, which I believe is $2,903,028, and just tell us what items go to make up that figure. Then, if you please, take your percentage of 55.5 and for the purposes of the record simply say to us that $1,750,000 is 55.5 per cent of another figure, but first tell us what goes to make up that master figure or total figure that you are using. We want your explanation to be more in the nature of giving us a mathematical computation [227] than to tell us how you have rationalized what you have done.

Do I make myself clear?

The Witness: You do.

The Court: I know you want to be helpful to us, and we want to be sure that we understand what your method is.

All right, then. Will you do that, please?

The Witness: I think I have it right before me, your Honor. I think I can give it off of this here (indicating document) if you will permit me to——

The Court: I think it is going to help you if you do it as I suggested. You may not like to do that, but I am going to ask you to take——

The Witness: I would have to take practically all of this here, because it is on two different bases, part on sales and part on barrels.

The Court: We are going to have to get through this, anyway. You have before you a schedule which is the same as what exhibit?

(Testimony of Cornelius G. Weber.)

The Witness: It is the taking of——

The Court: No, you have a photostatic copy of a piece of paper over there. What is that? Are you going to be relying on that?

The Witness: That is Exhibit 27, which I have used as the basis for allocating the fixed assets. [228]

The Court: I understand that, and you have told us that two or three times. Now, what is that typewritten schedule here? What exhibit is that?

The Witness: That is my own exhibit, and I don't believe that is in the record.

The Court: That is part of our trouble, Mr. Weber. We cannot have you testifying from your own schedules. We have to have your testimony tied up with the schedules that are in evidence. You have been shown several schedules in evidence. If you are using something that in your notebook is called "Exhibit E," what is it called in the record in this case?

The Witness: It is in 13, 14, 15 and 27. This is a composite that is made——

The Court: You made up a schedule, then, bringing together four exhibits in this case, is that correct?

The Witness: That's right, to arrive at this figure which has to be made compositely from——

The Court: How many years are you taking into consideration? You should not be taking into consideration more than one year in making this allocation of tangible assets to the business in Wash-

(Testimony of Cornelius G. Weber.)

ington. What year are you taking into consideration?

The Witness: The last year, 1912.

The Court: 1912? [229]

The Witness: Yes. I have done it for the other years, but merely as to a test.

The Court: Am I correct in understanding that you used a figure of $2,903,028 as the base figure? Did you so testify?

The Witness: That is the base figure for all the tangible assets.

The Court: Is that the figure to which you applied the percentage of 55.5 per cent, or it is not?

The Witness: No, I did not.

The Court: Now, without saying one word into the record, even if it takes you ten minutes to do it, I want you to write on that pad of paper the figure to which you applied the 55.5 per cent.

(Witness calculating.)

Mr. Mackay: If your Honor please, we have a rather difficult problem here of trying to assign the value to the particular territory. The witness has testified how he has done it, and I have in my hand a photostatic copy of a schedule showing how he arrived at that assignment and allocation. I have talked with counsel, and I think it would clear up the thing and hasten the trial a great deal if this could go in merely for explanatory purposes of the witness' testimony. I am not offering it as to the truth of what is in there, but just as to the explana-

(Testimony of Cornelius G. Weber.)

tion, because [230] it is all based on these other exhibits. I think it would help tremendously if it would go in.

Mr. Neblett: Your Honor please, after all, the witness is on the stand as an expert. Of course, if we give him time he can probably do it, but if he is not able to figure his value out, that certainly does show a deficiency in expertness. He is being tested out right now. Your Honor please, however, as an explanation of his testimony only and for that purpose only, as, you might say, a graphic picturization and how he explains his testimony, we have no objection to this document which Mr. Mackay has just handed me.

The Court: Very well. That is received as Exhibit 30.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 30.)

[Petitioner's Exhibit No. 30 appears in Book of Exhibits.]

The Court: Mr. Weber, had you about finished that computation, or is it too difficult to do now?

The Witness: It is a case of unscrambling eggs and rescrambling them. There are so many factors in there, to first take this apart and piece it together, that I cannot readily give that in a few figures without restudying this thing from another angle. The sequence is all given here and explained, because the total is very properly taken from the

(Testimony of Cornelius G. Weber.)

balance sheet. I started out with that, and it will show [231] the inventory and all the different items that were taken, and the whole process is explained step by step in here.

Now what I am trying to do is to simplify this beyond what I think I can do on here. I think I have already got that in its simplest form. I worked with this quite a bit to try to get this in better shape, but it is a complex thing on account of the way these properties are scattered, some allocated on a barrel basis and some on a dollar basis, and I will not admit that it is not that I don't know what I am doing here. I am. It is merely a case that I am trying to simplify it, and I can't simplify it beyond what is on here, at least, not in quick order.

The Court: Very well. Thank you very much for making an effort to do that.

The Witness: Not at all.

Mr. Mackay: Will you read the last question, please?

(The record was read by the reporter as follows:

"By Mr. Mackay:

"Question: Mr. Weber, you have testified that you made an investigation to determine the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier," as then associated with the products of the Seattle Brewing & Malting Company, and sold in

(Testimony of Cornelius G. Weber.)

the State of Washington, Territory of Alaska?

"Answer: Yes, sir. [232]

"Question: I think you have also stated that you took as your basic information the financial records of the Company, which have been put in here in evidence as exhibits. You have gone over that twice now, and we know in the record what the numbers of those exhibits are.

"From those financial statements and records, you have made certain deductions and arrived at a net worth of tangible assets in the State of Washington of $1,750,000.

"Answer: That's right.

"Question: You have also testified that you have taken into consideration the conditions as you found them to exist in 1913 with respect to the prospects of prohibition or other factors that may have had an adverse effect upon the brewery industry in the State of Washington, and that you also have taken into consideration the business trends at that particular time, in particular the trends of the business of the Seattle Brewing & Malting Company. Now, taking all those things into consideration, Mr. Weber, what in your opinion was the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier" as then associated with the products of Seattle Brewing & Malting Company as sold in the State of Washington and Territory of Alaska?")

(Testimony of Cornelius G. Weber.)

Mr. Neblett: I want to object on the basis stated.

The Court: It will not be necessary to state your objection.

Mr. Neblett: We have already stated our reasons.

The Court: Objection overruled. You may answer the question. [233] A. $1,000,000.

Mr. Mackay: Will you take the witness?

Cross Examination

By Mr. Neblett:

Q. Mr. Weber, I believe the effect of your testimony was that the local option reached its high point or maximum about 1911 or '12, or did you testify like that?

A. It had reached its maximum between 1908 and 1914. The exact point I don't think anybody could measure, just exactly the peak of the point in there.

Q. This value of $1,000,000 that you mentioned, for the good will, what would be your value as of March 1, 1914, we will say?

A. I haven't made a study of the value of March 1, 1914. I haven't valued it at that date.

Q. What would be your value as of March 1, 1915?

A. I have made a valuation only as of March 1, 1913, and I could not answer that.

Q. In your opinion would there be any difference between the March 1, 1913 value and the March 1, 1914 value of the good will?

(Testimony of Cornelius G. Weber.)

A. There could be a very substantial difference.

Q. In your opinion, was there a difference?

A. I haven't an opinion as to whether there is a difference. I haven't studied it. I don't know. I have [234] just confined myself to what I was requested to do, March 1, 1913. I have no other valuations.

Q. Let us bring it down a little closer. Let us take March 2, 1913. Would your opinion of the value vary very much?

A. I would say that it would be ridiculous to attempt to make a distinction in value between two days unless some extraordinary thing had occurred, like selling off, buying assets, or——

The Court: We understand. All right.

A. (Continuing): No. I would not think that I would find any difference there.

Q. I just want to get some idea of how you approach a valuation question, Mr. Weber. Suppose we would go to December 31, 1913? What would be your opinion of value?

A. December 31, 1913? I would have to look and analyze the trends and conditions, and see what other developments there had been, to have any opinion. There might be a difference. It might be higher, it might be lower, it might be the same, but I don't know.

Q. Didn't you as an expert, though, find it necessary to check these factors for confirmation or checking purposes subsequent to 1913, just a little bit?

(Testimony of Cornelius G. Weber.)

A. Subsequent to 1913 I checked and found that we had prohibition in the State of Washington in 1914, and that we [235] had national prohibition in 1920. I certainly checked into that, yes, but that is not what I thought was in the picture in 1913. After all, if on December 1, 1941, you had been asked to project a curve of automobile registration into the next five years, I am sure your curve would have been wrong because——

Q. You stick to the beer business, now. We are talking about March 1st.

A. ——unforeseen developments——

Q. Mr. Weber, do you know what the conditions were affecting the brewery business as of December 31, 1913? A. Yes.

Q. Do you know what the conditions affecting the brewery business were as of November 3, 1914?

A. November 3, 1914? Yes.

Q. In what way?

A. That was, I think the day when they voted Washington dry.

Q. They voted Washington dry?

A. I think it was about that date.

Q. What were those conditions just prior to November 3, 1914, that were the conditions of the brewery business on that date?

A. November 3, 1914, did you say?

Q. Yes. [236]

A. Insofar as they were visible, they were not any different from several months before, but that

(Testimony of Cornelius G. Weber.)

they were there and unforeseeable was proven by the subsequent events.

Q. Mr. Weber, I show you a pamphlet entitled "Anti-Saloon League Year Book, 1913," and ask you if you have ever heard of that book before?

A. I looked through a goodly number of anti-saloon books in the library in Seattle, and I believed I looked in that. I am not sure whether I looked through 1913, but I am quite sure I looked through it.

Q. I don't believe you referred to that book in your testimony.

A. I have not referred to that book, but I will say this, that Dr. Colvin mentions in here that very much of his material comes out of those Anti-Saloon League Books. In fact, I have a notation here, if you want for yourself a copy of this here, where he has that notation (indicating document).

Q. I would appreciate your giving me a copy, if you don't mind.

A. I will give you one. I don't want to take the Court's time.

Q. Let it go. Never mind now.

A. I will give it to you.

Q. Mr. Weber, do you know how much area in the State [237] of Washington was under no license, what is called "no license territory" in 1913?

A. I have from Dr. Colvin that there were six counties, and I think in my notes somewhere—I can't take the time now, unless you want to take the time—I think I have the names of the coun-

(Testimony of Cornelius G. Weber.)

ties. Then I would look up the area, but I don't remember the area.

Q. Do you know what the population of the State of Washington was in 1913?

A. I don't recall it right at the moment. I have that in my notes.

Q. All right, you don't recall. Do you know what the urban population of the State of Washington was in 1913?

A. Not from memory, no, I don't.

Q. Do you know what the rural population was?

A. If I don't know the urban, I would not know the rural.

Q. I didn't know unless you told me.

A. You see, I——

Q. Could you name any of the "no license" counties in the State of Washington in 1913?

A. If I can refer to my notes I——

Q. I am just asking you. You are an expert.

A. No. I have six counties dry.

Q. Do you know what percentage of the population was [238] under no license?

A. I know it was a very small percentage. That I know.

Q. Would you say 25 per cent?

A. I would say less.

Q. I call your attention here to this statement: "Population under no license, 42 per cent in the State of Washington." Did I read that correctly?

A. You are reading that correctly, yes.

(Testimony of Cornelius G. Weber.)

Q. Population under licensed territory in the State of Washington. What was that now?

A. That would be the difference.

Q. The difference, 58 per cent? A. Yes.

Q. Do you know the number of people in the State of Washington holding Federal retail liquor tax receipts in 1913? You wouldn't have any idea at all? A. No, I haven't that.

Q. What did the local option law of Washington provide, Mr. Weber, if you know?

A. Well, I don't know the wording of the law exactly, local option. I have interpreted it only in its general form.

Q. Do you know how many elections had been held under the provisions of the law passed in 1909 providing for local [239] option in 1913?

A. I didn't record them, but I read about them.

Q. How many were there?

A. I don't know.

Q. I show you here in this book, where it says: "Thus far 220 elections have been held under the provisions of this law."

Reading further: "140 of these elections have resulted in dry victories, while 80 have resulted in wet victories. As a result of these elections, 572 saloons have been abolished, and 87 per cent of the area of the State has been made dry."

You read this book up in Seattle, didn't you, Mr. Weber?

A. I read a good bit of that book, but it is not

(Testimony of Cornelius G. Weber.)

the information that I have about the amount that is dry in Dr. Colvin.

Q. You read this book up there. Why didn't you come down and tell this Court what you read in it?

A. I can't reconcile six counties with 82 per cent. I just can't.

Q. Reading further:

> "At the present time the unincorporated portion of 34 counties is without saloons, and 6 counties are entirely dry. There are more people living in the dry territory [240] in the State of Washington at the present time than the entire population of the State numbered in 1900. Most of the railroads have discontinued the sale of intoxicating liquors, and the steamboat companies are rapidly following the example of the railroads."

Did you read that up there in Seattle?

A. I saw that map, and the counties it has there, I can't reconcile with those statements.

Q. You saw this map up there?

A. Yes, sir, I saw that map.

Q. Did you have a photostat of it so you could use it down here in your testimony?

A. No, I didn't make a photostat of it.

Mr. Neblett: Your Honor please, we ask that this book be marked for identification.

Mr. Mackay: No objection.

Mr. Neblett: Their statistics are trustworthy!

(Testimony of Cornelius G. Weber.)

The Court: That may be marked for identification as Respondent's Exhibit A.

(The document referred to was marked as Respondent's Exhibit A for identification.)

By Mr. Neblett:

Q. Mr. Weber, I am going to ask you to take Respondent's Exhibit A and describe to the Court the wet and dry territory shown on the map in Respondent's Exhibit A. [241]

A. There is a map here showing the counties in the State of Washington. Part is in white and part is in black. I have not found yet whether the black or the white represents the dry or the wet.

Mr. Neblett: Your Honor, please, I have another book I can give you. It is as of January 1st.

The Court: Mr. Neblett, what is the key to that map?

Mr. Neblett: The key to that is "No License Territory," as I understand.

The Court: Where does it say that? Where is your key?

Mr. Neblett: "Population under no licensed territory, 42 per cent. Population under licensed territory, 58 per cent."

Now, the wet and dry map of Washington, January 28, 1913.

The Court: What is wet and what is dry?

Mr. Neblett: Just a second. I am trying to find the legend on the map.

Your Honor please, the legend says: "As a result

(Testimony of Cornelius G. Weber.)

of these elections, 572 saloons have been abolished, and 87 per cent of the area of the State has been made dry."

So, obviously the white is the dry and the black is the wet. [242]

Is that more or less your understanding of it, Mr. Weber?

The Witness: Could I ask a question, your Honor?

The Court: Yes.

The Witness: This book here, as Dr. Colvin says, is based largely on the Anti-Saloon League Books, and he says in there definitely that up to 1914 the counties had changed from 10 wet to 6 wet, and I cannot by any stretch of imagination reconcile these two things with all of this dry territory in the face of that statement and in the face of what all these breweries were expanding for, with 82 per cent of the State dry. There must be something wrong here somewhere. I just can't follow that.

The Court: Of course it may be that they were selling beer illegally in the State of Washington.

The Witness: I don't know about that.

By Mr. Neblett:

Q. Do you know about that, Mr. Weber?

A. I wouldn't assume that anybody would put good money in the business there in a big way, and then depend on that.

The Court: That has happened.

(Testimony of Cornelius G. Weber.)

Mr. Neblett: It certainly has, your Honor, and will probably continue there.

By Mr. Neblett:

Q. I believe you stated, Mr. Weber, that Mr. Colvin, [243] from whom you quoted rather extensively in your testimony, referred to the Anti-Saloon League figures.

A. Anti-Saloon League Books, yes.

Q. Just to see, Mr. Weber, how this matter progressed, let us take the 1912 Anti-Saloon League Book. We will go in reverse, rather than the other way, and see what the situation was so as to, what you might say "spot a trend."

Mr. Weber, I call your attention to the Anti-Saloon Year Book for 1912, edited by Ernest H. Cherrington. Mr. Cherrington edited it for 1913 also.

Reading from this book:

"The local option for Washington providing for a vote on the liquor question in towns, cities, and the unincorporated portion of the counties as separate units had been in operation since 1909. Thus far 129 elections have been held. 84 of these elections have resulted in dry victories, while 45 have resulted in wet victories. As a result of these elections, 360 saloons have been abolished, and 71 per cent of the area of the State has been made dry."

Do you follow me, Mr. Weber?

A. I follow you, but I can't reconcile it with this.

Q. Then, 87 per cent had been made dry, I be-

(Testimony of Cornelius G. Weber.)

lieve. Is that your recollection of what the '13 Hand Book showed?

A. I am going by his summarization.

Q. I did not ask you that. [244]

A. I don't recall what I read in the '13.

Q. Very well.

> "At the present time the unincorporated portions of 19 counties are without saloons. 4 counties are entirely dry, and 71 municipalities, including 15 county seats, are under no licenses."

I believe you spoke of no license in your testimony in chief. What is meant by "no licensed territory," Mr. Weber?

A. "No licensed territory" means it is dry, in the vernacular, the word "dry".

Q. That is what I want. I want your definition to appear through the vernacular.

Mr. Mackay: I never heard of the "brewery vernacular".

Mr. Neblett: I will take Mr. Weber's word for that.

By Mr. Neblett:

Q. Continuing, Mr. Weber:

> "There are more people living in dry territory in the State of Washington at the present time than the entire population the State numbered in 1900. Most of the railroads have discontinued the sale of intoxicating liquors,

(Testimony of Cornelius G. Weber.)

and the steamboat companies are rapidly following the example of the railroads. Between 1400 and 1500 saloons are operating in [245] all parts of the State. The saloons of Seattle are confined by a city ordinance to a very small portion of the city area.

"One of the most important and far-reaching decisions of the State Supreme Court in recent years is that just handed down in the case of State v. Falkenstein. Falkenstein, as Steward of the steamboat Kennedy, plying between Seattle and Bremerton, conducted a bar on the boat without having a license from the city and county authorities. Twice convicted, he appealed to the Supreme Court, which conviction was affirmed, the Court holding that it was necessary not only to have paid $25 license fee to the State, and a $25 tax to the United States, but also to secure a license from the County Commissioner.

"The significance of this decision will be much more apparent when it is understood that it will compel every steamboat plying on any of the waters within the State, and every dining and buffet car within the State to have a city, town and county license for each and every city and county within which sales are attempted to be made.

"The defendant argued that such a conclusion would practically prevent the sale of liquor on dining cars and steamboats, but the Supreme

(Testimony of Cornelius G. Weber.)

Court said the Legislature had the right and power to do this, and refused to free the defendant."

A decision of that nature would create some discussion [246] in the State of Washington, wouldn't it, with respect to prohibition, don't you think, Mr. Weber?

A. It might.

Q. A decision of that nature would be published in the papers in the State of Washington, wouldn't it? A. It might.

Q. If it was, and a prospective buyer read it, he might have some doubts about going into the beer business, don't you think?

A. Not much, no.

Q. Not much?

Let us go back just a little bit further, to 1911.

I show you, Mr. Weber, the Anti-Saloon League Year Book of 1911.

Mr. Mackay: May I ask, Mr. Neblett, have you any books put out by the breweries?

Mr. Neblett: Yes, I have the Year Book of the United States Brewers, put out by the brewery business. I will be glad to call your attention to the contents in a little while. They ought to be authentic.

By Mr. Neblett:

Q. Mr. Weber, I show you an Anti-Saloon League Year Book for 1911, edited by Mr. Ernest H. Cherrington.

(Testimony of Cornelius G. Weber.)

Could I be pardoned just a second, your Honor? I want to have the 1912 volume marked for identification. [247]

The Court: That may be marked for identification as Exhibit B.

(The document referred to was marked as Respondent's Exhibit B for identification.)

By Mr. Neblett:

Q. Mr. Weber, calling your attention to an article appearing on the State of Washington in the Anti-Saloon League Year Book of 1911, I ask you to examine that article and see if you read this book when you were up in Seattle, and saw the map on page 78 of that book.

A. I don't recall seeing that map, and I did not read all of these books through. I didn't have that much time. I don't recall. I may have seen it, and I may not have. I did not attach as much importance to that as I did to this.

Q. I show you a map which bears beneath it the legend—what is that legend, Mr. Weber?

A. "White, dry area. Black, wet area."

Mr. Neblett: Your Honor please, I would like to have your Honor see the map. (Handing book to the Court).

The Court: It will be interesting for you to pursue this, but I recall that there are situations of this kind: there will be an area in which the sale of liquor is prohibited. For instance, I think the

(Testimony of Cornelius G. Weber.)

sale of liquor was prohibited around the University of California; probably still is. I don't think liquor could be sold within a radius of a [248] certain number of miles. It may take in practically the whole town of Berkeley. But, liquor is sold in San Francisco, so the sales, instead of being distributed over the two areas, are concentrated in one area. So, this is a very argumentative point that you are going into, assuming that there—let me see your map again.

Mr. Neblett: This is the map with respect to 1911.

The Court: Even in 1913, assuming that out of thirty-six counties in the State of Washington, (we can suppose that there were thirty-six counties), there were even only four wet counties. If those counties are distributed through the State, it is possible for those counties to be the selling points for an area that is quite wide, with dry areas around the side.

The fact is that the Seattle Brewing & Malting Company sold quite a large volume, by dollars, of beer in the State of Washington in 1913, isn't that true, Mr. Mackay?

Mr. Mackay: That is right.

The Court: So I do think, Mr. Neblett, that——

Mr. Neblett: I see your Honor's point.

The Court: ——you might shorten this. I know that you want to make an argument. You also want to call these matters to the attention of this witness, but from the witness' very complete direct

(Testimony of Cornelius G. Weber.)

testimony I understand that he [249] formed the opinion that Dr. Colvin's book was the most authentic study of prohibition and of the various periods in the history of this country when certain areas of the country adopted prohibition laws. That book is a general treatise. Dr. Colvin apparently referred to the Anti-Saloon League books and publications of various kinds, and no doubt in the appendix of Dr. Colvin's book he has a list of all his source material. At any rate, the relation of this to the entire issue gives it a value of not more than 50 per cent, anyway. It is not the whole point.

Mr. Neblett: Your Honor, my only point was to show that these books were in general circulation there. This book that Dr. Colvin got out was not published until 19——when, Mr. Weber?

The Witness: '26.

Mr. Neblett: The Anti-Saloon League Books were in circulation all over the country in 1913, and a man putting in his money would very likely go here to get his statistics with respect to what the trend was in respect to prohibition. That is all I am trying to do with this witness. I am going to show in a little while the newspaper clippings at the time prohibition commenced in the City of Seattle.

I see your Honor's point.

The Court: Now I see your point. This goes back [250] to the objection that you made when Dr. Colvin's book was mentioned by the witness. This book was written in 1926.

(Testimony of Cornelius G. Weber.)

Mr. Neblett: Exactly.

The Court: We are here considering what the willing buyer and the willing seller in 1913, having a knowledge of the trends and of market conditions and of the properties involved, would have paid for the good will of this business in the State of Washington.

Mr. Neblett: That is right.

The Court: And you, through these books, therefore wish to show the kind of information that people had circulating about them in 1913.

Mr. Neblett: That is exactly it, your Honor.

The Court: I don't think this witness is going to concede that people in Washington in 1913 were concerned about the increase of the dry areas in the State. So far the witness has indicated that he does not agree with your theory.

Wouldn't it save time if you have all of these books put in evidence? I don't know what the objection will be.

Mr. Mackay: Your Honor please, may I make this observation?

It is not my purpose in any trial to limit the Commissioner or the Respondent in examining one of my witnesses, [251] in testing his credibility or expertness, or anything else, but it does seem to me it is going a little far afield to read into all the books here to try and get all this evidence in by this witness.

The Court: That is correct.

Mr. Mackay: I think it is going a little beyond

(Testimony of Cornelius G. Weber.)

the method of procedure. I think, so far as counsel is concerned, if he wants to ask him about certain statements in the book, or a dozen books, to test his credibility or his knowledge, or something like that, it is all right, but to lay a foundation to read a lot of things in there for evidentiary purposes is wrong.

The Court: I think your objection and criticism are correct.

Mr. Neblett: Your Honor please, at the same time I am showing the circulation of this, I am showing that his opinion is not based on sound reasons, and I am trying to show that the information contained in these books is trustworthy. I can identify these books by him, which I am doing at the present time.

The Court: I wonder if you would consider asking the witness whether his opinion on the valuation question is affected by the fact that in 1913 this was the situation as shown by these reports?

Mr. Neblett: I did not quite follow you, your Honor. I have no objection to your Honor asking the witness a question if you care, or I can ask it.

I believe we have a pretty wide right, though, in cross examination. I have the right to test his credibility and to impeach his testimony in any way I can. Anything I can show that would influence a buyer, I think I have a right to show, to talk about what he testified in chief, matters connected with what he testified, and modify or explain his testimony in any fashion that we can on cross examination.

(Testimony of Cornelius G. Weber.)

The Court: You certainly have. Our difficulty is in understanding the purpose of your showing the witness these books, and of reading excerpts to the witness out of these books. It has not been entirely clear why you are doing that. It is an unusual kind of cross examination.

Will you proceed?

Mr. Neblett: Thank you very much, your Honor.

The Court: I expect we should not insist that Mr. Neblett abandon this inquiry that he is making. The whole thing is unusual, but I think we will just go ahead.

Mr. Neblett: Very well, your Honor. I certainly will keep in mind your admonition to shorten it as much as I can.

Mr. Cassel, may we have "Anti-Saloon Year Book, 1913," marked for identification? [253]

The Court: That is being marked Exhibit C, is it, for identification?

Mr. Neblett: Yes.

(The document referred to was marked as Respondent's Exhibit C for identification.)

By Mr. Neblett:

Q. Mr. Weber, I show you the Year Book of the United States Brewers Association for 1913. Did you ever look at the book of that Association?

A. Yes, I looked through some of those books, but did not get much out of them.

Q. Do you recall whether you looked through the 1913 Year Book?

(Testimony of Cornelius G. Weber.)

A. I scanned through the 1913.

Q. Calling your attention to page 58 of this book as to the State of Washington, I call your attention to the short statement, five or six lines:

> "Washington. The dry and wet issue in the State of Washington was one of the most important local questions to come up in recent elections. The victory is about even for the saloon and anti-saloon forces. Licensed saloons won out in several instances, notably Olympia, but the general tendency was to maintain present conditions. Kennewick, which has waged a bitter fight, voted to remain dry, and Vancouver, after a spirited contest, decided to stay wet." [254]

With that statement in mind, what effect, Mr. Weber, do you think that would have on a prospective buyer of a beer business in the State of Washington?

A. They had so much of that over a period of years, shifts this way, shifts that way, and as I repeatedly said, "Wolf! Wolf!" and I don't think it had any material effect, because that controversy has been going on and on and on.

Q. How do you explain that on November 3, 1914, the State of Washington voted dry, Mr. Weber?

A. Because the majority of the people that went to the polls on that date voted dry; those that went.

Q. Is that your explanation?

(Testimony of Cornelius G. Weber.)

A. Well, I think that is obvious. I would say that is very obvious.

Q. Let us cut a little deeper than that. What caused the people, in view of your testimony, to go up to the polls and vote dry on November 3rd?

A. A very, very intensive campaign by the Anti-saloon League. I read about that campaign. They put on a real campaign in Washington.

Q. And the campaign was all written up in the papers in Washington, was it not?

A. The campaign? I read about it in the Anti-Saloon League Book.

Q. I did not ask you that. You answer my question. I [255] asked you if this campaign appeared in the papers of Washington, the daily papers.

A. Not much, from what I saw.

Q. You didn't see much?

A. Not much.

Q. Do you know what the vote was on November 3, 1914?

A. Yes, I know what the vote was. I can give it to you.

Q. What was it?

A. Well, I can't remember all of these figures. Let me get it here.

Q. I will give it to you, if you are just looking it up now.

A. Well, one hundred eighty something and one hundred seventy-one something thousand; in that neighborhood. I don't know the exact figures.

(Testimony of Cornelius G. Weber.)

Q. Just wait a minute, now. I will put it in the record for you.

Mr. Mackay: Let the witness answer. He has the right to look it up.

A. The vote was 180,840 for prohibition, and 171,208 against.

Q. That is correct.

Now, Mr. Weber, what are some of the daily papers [256] in the State of Washington?

A. What are some of the daily papers?

Q. Yes.

A. Well, the Seattle Times and the Post Intelligencer were the main dailies at the time.

Q. What are some more papers?

A. Well, there was an Argus there. I think that was a weekly at the time, and those are the only three I know of.

Q. Did you ever hear of the Tacoma Ledger?

A. Well, I am talking more specifically about Seattle. Yes, I have heard of the Ledger.

Q. The investigation you made in this case, was it confined solely to Seattle, when you went to Washington?

A. No, it wasn't confined to Seattle, but it wasn't a case of going to every town in the State.

Q. Do you know how many times, or the number of references to local option and state prohibition in Washington in 1912 and '13 appeared in the Seattle P. I., Post Intelligencer?

A. I think I have a record of it, but I don't remember the figures, and it is buried in my notes

(Testimony of Cornelius G. Weber.)

somewhere. I have an extract of different articles that appeared.

Q. When you were up there in Seattle making investigations, did it occur to you to go back and look at the old files of the papers and see what was said?

A. I spent two solid days in just those files, yes, sir. [257]

Q. The old newspaper files? A. Yes, sir.

Q. In what company?

A. In the Public Library.

Q. In your testimony here, you did not say anything about that. Do you recall, then, now, since your recollection has been somewhat refreshed, how many times there appeared in the Seattle Post Intelligencer references to local option in 1912 and 1913?

A. I would say it was not very often in comparison to the number of papers, but I haven't got the figures in mind.

Q. Let us take the Seattle Times. What would you say about the references to prohibition in 1912 and '13 in the Seattle Times?

A. The same thing. Not very much.

Mr. Mackay: What are you talking about, news articles or editorials?

Mr. Neblett: I am talking about articles and references to local option and prohibition in the papers which a buyer would probably see.

Mr. Mackay: Thank you.

(Testimony of Cornelius G. Weber.)

By Mr. Neblett:

Q. You haven't any information on that, Mr. Weber?

A. I have some information, but not very much, and I can't give you the figures. I did not consider them important [258] enough.

Q. I have a sheet here attached to a protest furnished us by petitioner. It says, "John E. Forbes & Company, Rainier Brewing." It is entitled, "Rainnier Brewing Company Summary Showing the Number of References to Local Option and State Prohibition in Washington in 1912 and 1913 Compiled from Leading Newspapers by Month."

Look at that summary and see if it refreshes your recollection as to whether or not that is what you saw when you were investigating the newspaper files in Seattle.

A. I saw it, but I saw nothing very convincing in any of them. I just would not put any interpretation on them; in fact, disregarded them after I had them.

Q. You disregarded them completely?

A. Yes, because they meant nothing, just a controversy back and forth and back and forth. I couldn't make anything out of it until I got a hold of this.

Q. Unless you saw something that was very favorable to your side of the case, it is a fact that you disregarded it completely?

A. Indeed no. I come to these cases with a privilege to turn them down, and I am not going on a

(Testimony of Cornelius G. Weber.)

witness stand for a lot of fun and saying a lot of things that I don't mean. I wouldn't do it for anybody; neither here nor there.

Q. Let me test your expertness for a second, and the [259] basis of your approach, Mr. Weber.

Do you think if a man was coming into the State of Washington with some money to invest in beer, and he looked in the paper and saw all this argument about prohibition, and saw this data that I have shown you from Respondent's Exhibits for identification, A, B and C, would you say that would have any influence at all on whether or not he invested $1,000,000 in the good name up there, in the name of a beer company?

2—RAINIER—folo Watts—April 10 Sprague

A. Practically no influence, as I have shown and answered before, showing what money these people put into breweries at that time, they could not have been influenced by that to amount to anything.

Q. Suppose you had told this gentleman to go ahead and put his money up, and on November 3, 1914, he came around and told you that statewide prohibition had been passed, what would you tell him as to your judgment?

A. I would have to admit that the facts of voting prohibition were contrary to the outlook at the time. That is obvious.

Q. Would you come right out and tell him, "I apologize. I was wrong, dead wrong. I did not evaluate this trend as I should."

A. How would you value other things? Just the

(Testimony of Cornelius G. Weber.)

way they appear at the time. Those are the only indications you have [260] of value. In retrospective hind-sight, it is easy to see afterwards what conditions were. Just like Colvin's book is a perspective. He can see the significance of the event in retrospect.

Q. What is your definition of "fair market value?"

A. What a willing buyer would pay a willing seller at an arm's length transaction.

Q. When?

A. At the particular time of this particular case, March 1, 1913.

Q. Is that your entire definition?

A. Just about, yes.

Mr. Neblett: Read that definition back, will you please, Miss Reporter?

(The answer was read by the Reporter.)

By Mr. Neblett:

Q. You would say that was just about the total of your definition? A. Yes, that covers it.

Q. And your $1,000,000 value here for the trade name was based on that understanding of fair market value, is that right? A. Yes, sir.

Q. Your definition does not include knowledge of the facts by both parties, Mr. Weber. [261]

A. Well, that is understood. A man would not buy anything he did not understand anything about. That is just common sense.

Q. I am just saying, though, your definition of "fair market value" did not include that.

(Testimony of Cornelius G. Weber.)

A. Then I could give you a very, very long definition. I would have to sit down and write that out and take in all the factors if you cannot imply that people exercise common sense in buying something. They know about it.

Q. A buyer coming into the State of Washington and exercising common sense, don't you think he would get statistics on the entire business from any sources he would think were trustworthy?

A. Certainly he would; no doubt did.

(Witness excused.)

Mr. Neblett: Your Honor please, may we have this exhibit marked for identification as Respondent's Exhibit D, I believe?

The Court: That will be marked for identification as Exhibit D.

(The document referred to was marked Respondent's Exhibit D for identification.)

Mr. Neblett: Exhibit D is a summary showing the number of references to local option and state prohibition in Washington in 1912 and '13, compiled by leading newspapers, [262] by months.

The Court: I think that we will recess for the day. It is about 5:30.

I would like to have a conference with counsel on the time that we may expect should be allowed for the full presentation of the case without anyone's feeling that he has to hurry too much.

I would like to work out a plan so that everything

will be thoroughly considered and the witness will be allowed to talk as much as he wants to, and we won't feel too pressed.

So, we will recess until tomorrow morning. I think we should convene at 9:30.

Mr. Mackay: I think that would be very agreeable.

The Court: That will save us a half hour.

9:30 tomorrow.

(Whereupon, at 5:30 p. m. a recess was taken until 9:30 a. m., Friday, July 20, 1945.) [263]

Proceedings, July 20, 1945

The Clerk: Mr. Weber, will you please take the stand?

CORNELIUS G. WEBER,

called as a witness for and on behalf of the petitioner, having been previously sworn, was examined and testified further as follows:

Cross-Examination—(Resumed)

The Court: Go ahead, Mr. Neblett.

By Mr. Neblett:

Q. Mr. Weber, in order to orientate ourselves, I believe we were discussing yesterday your judgment in advising a prospective buyer to pay a million dollars for the name Rainier, is that right?

A. Yes.

(Testimony of Cornelius G. Weber.)

Q. As of March 1, 1913? A. Yes, sir.

Q. And your disregard of certain factors in the current literature of 1913, is that right?

A. I did not disregard any that I investigated. I did not disregard any.

Q. I believe you told us yesterday that these various matters and data I showed you from the current literature of the time, namely, March 1, 1913, you disregarded, it didn't [268] make any difference to you at all, is that right?

A. Do I have to answer that question "Yes" or "No," or can I qualify that?

The Court: Answer "Yes" or "No," and qualify it. You answer it the way you think you should answer.

The Witness: Subsequent review by Dr. Colvin and his crystallization of the past events I considered more authentic than the current partisan views.

By Mr. Neblett:

Q. I believe I called your attention to the Year Book of the United States Brewers Association for 1913. Did you consider the article or the excerpt I read you from that book a partisan view in so far as this case is concerned?

A. I don't recall the specific excerpt.

Q. I will refresh your recollection, Mr. Weber, and ask you to refresh your recollection by reading that excerpt on page 58 of this Year Book of the Brewers Association.

A. (Examining document): I believe I reviewed that. I believe I saw that.

(Testimony of Cornelius G. Weber.)

Q. Don't you think a prudent buyer would probably have called for the Year Book of the United States Brewers and looked at it before putting up his million dollars?

A. I don't doubt that they did. Anybody investing money must have. They had those books in circulation in breweries more than any other place.

Q. Now, if this prospective buyer that you advised to put his million dollars in the business had followed your advice and paid a million dollars for this right, can you give us any idea of how much money he would have lost on the transaction?

A. He would have lost very much money later on just the same as those that put their money into physical assets that became practically worthless. There were many buyers at that time—if you consider expanding a brewery, or building new breweries, that went dry later on; that money was also wasted.

Q. Yes. A. No different.

Q. In other words, he would have practically lost his million dollars, would he not?

A. Practically so. Not the million dollars, but he would have lost a good bit of money, that is true.

Q. Then if he had followed your advice and your evaluation of the trends, he would have lost a substantial amount of money, is that not right?

A. Yes, he would have.

Q. Now, Mr. Weber, in this same book, the Year Book of the United States Brewers Association, 1913, I call your attention to another article on

(Testimony of Cornelius G. Weber.)

page 248 entitled "Aiming at National Prohibition." [270]

When you were making your investigation of this case, did you read that article, if you recall?

A. (Examining document): I didn't read all of the literature.

Q. I didn't ask you that.

A. No, I didn't. I didn't read that article.

Q. O.K. You knew that the United Brewers put out a Year Book for the year 1913, did you not?

A. Yes, sir, and I reviewed many of them.

Q. But you did not happen to review this one, the one for 1913?

A. Oh, yes, I did, very much, 1913, but I didn't read every article in it.

Q. Did you check the indexes in this book for 1913 very carefully as to what was in it?

A. I did.

Q. And you overlooked, then, in your research this article "Aiming at National Prohibition," is that right? A. I didn't overlook it, no.

Q. You didn't consider it necessary to read it, in other words?

A. I scanned some of these articles, and if they were not sufficiently pertinent or conclusive, if they were merely controversial I disregarded them because I was looking for [271] concrete facts and not this endless controversy that has been going on for a hundred years.

Q. It seems to me you would find concrete facts in the Brewers' own book?

(Testimony of Cornelius G. Weber.)

A. Yes, I did. I have many notes and supplementary notes taken out of the Year Book. I can't recall what they all are. But I have made lots of extracts from the Year Books, pages of them.

Q. All right. Now I am going to call your attention to one factor here, just the first paragraph of this article, which consists of about four pages:

> "We have time and again pointed out to our members that the Anti-Saloon League was aiming at national prohibition under the makeshift of local option. Elated over the passage of the Webb Bill, it has at length frankly declared its purpose. That such program meets with full sympathy in the general body of temperance extremists is clearly evident from the following editorial expressions in the Michigan Christian Advocate. Under the caption 'Amend the Constitution Once More,' this paper states:——"

Now, incidentally, Mr. Weber, what was the Webb-Kenyon Act? I want to see how thoroughly you did prepare your research.

A. I couldn't specifically tell you the details of the [272] Webb-Kenyon Act, or every law that was passed at that time. I have gauged this thing by the practical facts of breweries being built and expanding, and the retrospective history which shows what had been going on after.

Q. I didn't ask you that. I asked you if you knew what the Webb-Kenyon Act was?

(Testimony of Cornelius G. Weber.)

A. I didn't go into specific——

Mr. Neblett: (Interposing) It doesn't seem to me, if your Honor please——

The Witness: (Interposing) I can't answer for these legal——

Mr. Neblett: (Interposing) This witness went clean over the ocean to Chamberlain and Mussolini in his testimony in chief. He was a very voluble witness, and he covered a very wide territory, and he has put his testimony in here, and we think on cross-examination we should be allowed great leeway.

The Court: Go ahead.

The Witness: As I recall, it was a local option Act, but the details——

By Mr. Neblett:

Q. (Interposing) Now, do you know when the Webb-Kenyon Act was passed, or anything about it at all?

A. I think it was in 1909, but I am not sure.

Q. Now, my advices show and my notes show that the Webb [273] law was passed—the judiciary reported in the Webb Bill on February 3, 1913.

A. 1913.

Q. And it was passed by a vote of 239 to 65. The following Monday the Senate passed the Kenyon Bill, amended to read exactly as the Webb Bill.

Now, did you find out anything about the Kenyon Bill in your research on this question?

A. In my research on this question, when I

(Testimony of Cornelius G. Weber.)

found that the local option, as Dr. Colvin found, had worked contrary to prohibition——

Q. (Interposing) Just a minute, Mr. Witness. I asked you: Did you find out anything about the Kenyon Bill? A. No, I did not.

Q. You did not?

A. No. I read about it, but I did not go into detail, and I didn't make any notes on it.

Q. You didn't learn, then, that the Webb-Kenyon Bill was an anti-shipment of liquor Bill? You didn't learn that, did you?

A. (No response.)

Q. You know what the original package law was, don't you, being in the brewery business as long as you have been?

A. The original package law? [274]

Q. Yes. A. Yes, sir.

Q. What was that law, then?

A. That you couldn't fake any packages, or re-use a package, as I recall. You have to use your own labels and you cannot use anybody else's name.

Q. Wasn't the original package law, Mr. Weber, that you could ship whiskey into a dry State in the original package, and under the interstate commerce law it almost put the station masters and express companies in business, in the whiskey business because a man in a dry State could go down to the station and get his original package? Wasn't that what that law was?

A. Oh, the whiskey end, I didn't go into the

(Testimony of Cornelius G. Weber.)

whiskey phase of this thing. I was more concerned with the beer phase. That didn't concern me. I——

Q. (Interposing) Beer and whiskey are somewhat related, are they not?

A. Very distantly, I would say.

Q. But they do both have alcohol in them?

A. Yes, yes, they would have alcohol in them, but there would be a difference.

Mr. Neblett: If your Honor please, may we have marked for identification——

The Court: (Interposing) That would be "E" for [275] identification.

Mr. Neblett: Yes, Respondent's Exhibit "E", page 58 of the Year Book of the United States Brewers Association.

The Court: That may be marked for identification as Exhibit "E".

(The document referred to was marked as Respondent's Exhibit "E" for identification.)

Mr. Neblett: We would also like marked for identification the article on page 248, "Aiming At National Prohibition."

The Court: "F" for identification.

(The document referred to was marked as Respondent's Exhibit "F" for identification.)

By Mr. Neblett:

Q. Mr. Weber, I show you a book entitled "Review of Reviews, Volume 48, July-December 1913", and call your attention to an article in this

(Testimony of Cornelius G. Weber.)

volume entitled "The Campaign Against the Saloon", by Ferdinand Cowle Iglehart.

This article consists of one, two, three pages, and is illustrated with maps.

Do you recall whether in your research you read that article before forming your opinion?

A. I did not read that article, and I did not place much reliance on maps. I think maps are the most deceiving thing in this whole campaign. No, I did not see that. [276]

Q. You don't think maps are something that you can see with your face as trustworthy, I mean with your eyes as trustworthy?

A. To a degree, yes; to a degree, yes.

Q. But testimony which is not so patent is more reliable, is that your theory as an expert?

A. Not at all. The pros and the cons, whichever outweighs the other, in my opinion, is the thing that I act on.

Mr. Neblett: If your Honor please, we ask that this article "The Campaign Against the Saloon", by Ferdinand Cowle Iglehart, contained in the July-December 1913 Review of Reviews, be marked for identification.

The Court: It will be marked for identification as Exhibit "G".

(The document referred to was marked as Respondent's Exhibit No. "G" for identification.)

Mr. Neblett: Incidentally, your Honor, it is a

(Testimony of Cornelius G. Weber.)

very nice summary of Mr. Weber's testimony, but putting an entirely different light on some of this. I would like to have both sides in the record.

Your Honor might enjoy seeing this article (handing document to the Court).

The Court: Are you going to introduce it in evidence later?

Mr. Neblett: Yes. [277]

By Mr. Neblett:

Q. Now, Mr. Weber, I believe you referred rather extensively in your testimony in chief to a book published in 1927, I believe? A. '26.

Q. '26? A. Yes, sir.

Q. And, therefore, I am going to refer to a book published in 1913. That is a little closer to the basic date.

Now, Mr. Weber, I call your attention to the Sunset Magazine—you have heard of that Magazine, have you not?

A. I have heard of it, yes.

Q. It is published out on the West Coast and has got a lot of pretty pictures in it.

Volume 33, 1941, and ask you if, in your research on this question, you had occasion to call for this volume and whether or not you read an article—— A. (Interposing) No, I did not.

Q. What, let me finish now before you commence to nod your head.

(Continuing) Whether you read an article "State-wide Prohibition in California", by S. W. O'Dell? A. I did not.

(Testimony of Cornelius G. Weber.)

Q. You did not read that article?

A. No, sir. [278]

Q. And you don't know what it contains?

A. I do not.

Mr. Neblett: If your Honor please, we ask that an article appearing in the Sunset Magazine, Volume 33, 1941, entitled "State-wide Prohibition in California", by S. W. O'Dell (incidentally, President of the California Dry Association) be marked for identification.

The Court: It may be marked for identification as Exhibit "H".

(The document referred to was marked as Respondent's Exhibit "H" for identification.)

By Mr. Neblett:

Q. Mr. Weber, turning to another point, let us attempt to analyze what you consider goodwill to be.

What do you include as the goodwill of a company?

A. The goodwill broadly, in a case of this kind, includes everything of an intangible character. Now, any business, any physical property, any patent assumes reasonably good management in order to be successful. Now, if you have a name, a trade name that is the basis, the controlling element in producing big sales and big profits, the profits that are over and above an amount necessary to satisfy the capital and physical property broadly could come under the term "goodwill".

(Testimony of Cornelius G. Weber.)

Now, with very poor management, goodwill could peter out, and with reasonably good management it could not, so that broadly is all-inclusive.

Q. I don't want the answer quite as broad as that, Mr. Weber. I want you to break the goodwill down for me and show me right now what is specifically included in it. Certainly, you know the items of goodwill are the things that go to make up goodwill.

A. All of the items that make——

Q. (Interposing) Yes, I want you to name them right now, the factors that you took into consideration, and break it down for me, one, two, three, what you consider goodwill to include.

A. I have said that the goodwill includes all of the factors that make for profit over and above a normal return on the investment in physical assets, and it implies, of course, that management, good management goes along with the good name.

Q. All right, now stop right there. Let's get a responsive answer.

What are those factors now that you are talking about?

A. I couldn't possibly name them all, because you would just have to analyze the goodwill of every person and every customer all down the line. You can include those things only broadly. These are practical factors. You can't [280] theorize that down to the last detail.

Q. Well, let me ask you this now, Mr. Weber?

(Testimony of Cornelius G. Weber.)

Does your goodwill include the name of the Seattle Brewing & Malting Company?

A. It includes the name Rainier as attached to the property and the business.

Q. I didn't ask you that question. I asked you if your goodwill that you used in this case included the name Seattle Brewing & Malting Company, which company owned the name "Rainier"?

A. I have got it attached to Rainier, to Rainier.

Q. I didn't ask you that question. I asked you: Did the goodwill you used in this case include the name Seattle Brewing & Malting Company?

A. Well, it must have, because it was so tied together at that time, in 1931, that it was all a unit, the whole thing was a unit?

Q. Exactly. A. Yes.

Q. It was a unit, I believe you said?

A. The whole thing went together.

Q. So your value of one million dollars includes in its comprehensiveness the name Seattle Brewing & Malting Company, which owned the name Rainier?

A. No, it doesn't include it, except in this way: at the [281] time, and before—that is on the assumption that it would be divorced. At that particular time it was Rainier, as it was the property of the Seattle Brewing & Malting Company. That is what it was.

Q. That is the best you can do with that question? A. (No response.)

Q. And again in arriving at your value of the

(Testimony of Cornelius G. Weber.)

one million dollar figure, your value of one million dollars you included the name Seattle Brewing & Malting Company?

A. I included the name Rainier, the name Rainier.

Q. So you want to change your previous testimony?

A. Well, if you divorce it—you could divorce the name Rainier, or if the brewery would go out of business you could sell the brewery name, but then you come to that point of severance there.

Q. All right.

A. It is the name Rainier.

Q. Now, in your opinion can the name Rainier be severed from the business?

A. Yes, it can.

Q. It can? A. Yes, it can.

Q. All right. Now, let's sever the name Rainier from the business then. And is your value of a million dollars then based on the name Rainier severed from the business of [282] Seattle Brewing & Malting Company?

A. The sale value, yes.

Q. And you base that on this name alone, is that right? A. Yes, on the name.

Q. Well, now, Mr. Weber, do you think that the right to do business under the Seattle Brewing & Malting Company in the State of Washington had any goodwill value?

The Witness: That the what?

The Court: Read the question.

(Testimony of Cornelius G. Weber.)

(The question referred to was read by the Reporter.)

By Mr. Neblett:

Q. As of March 1, 1913?

A. I haven't investigated that as a separate condition at that particular time, as to what there was to that or wasn't. But I would say that without "Rainier" it wouldn't have been anything of any material consequence.

Q Do you know how long Seattle Brewing & Malting Company have been in business?

A. Yes.

Q. How long?

A. They have been in business since—I think it was since 1893, and I think the brewery was founded in the 80's. I have it in my records somewhere. [283]

Q. Did they have a list of customers? Did the Seattle Brewing & Malting Company have a list of customers in 1913?

A. They had a list of customers, yes.

Q. Do you know how many there were?

A. No. But I wish I could modify or expand on that a little bit, in the definition of goodwill.

Q. All right, go ahead and expand it. I don't want to cut you off. I want to be perfectly fair with you, Mr. Weber.

A. Goodwill, as recognized in appraisal practice, to have a value you first have to earn a substantial return on the physical assets. Now, even

(Testimony of Cornelius G. Weber.)

a company losing money, if it has got only five customers, you might say in a sense there is goodwill there, it has got the goodwill of five people. But he isn't making any money, and one wouldn't recognize that in appraisal practice as an element of goodwill until it builds up to a point where it represents money over and above the physical assets. So I didn't go into those customers or anything like that to see what they would have bought without that name, and whether it would have meant more than a fair return on the physical assets.

Q. Well, is not your value of a million dollars in this case based on the fact that prior to 1913 Seattle Brewing & Malting Company was making money? A. Prior to 1913?

Q. Yes. Isn't that the very essence of your value? [284]

A. Well, the name Rainier, with the name Rainier and the Medals that they won, and so forth.

Q. All right. These Medals don't have much to do with this case. After all, that is more or less of a commercial nature, Mr. Weber.

A. No, I don't agree with that.

Q. That happened in 1900.

Now, Mr. Weber, didn't Seattle Brewing & Malting Company as of March 1, 1913, have a going concern value separate and apart from the name Rainier? A. I can't divorce it.

Q. You can't divorce it?

A. No. It wouldn't have made any money in

(Testimony of Cornelius G. Weber.)

proportion, and all of that would have to come up to the point of earning a fair return on the entire physical assets before such a separation could be made at all.

Q. Didn't Seattle Brewing & Malting Company as of March 1, 1913, have a good sales organization separate and apart from the name Rainier?

A. Why, yes, those things are all necessary in any business.

Q. All right. Now, tell me, then, as an expert in the brewery business how much value would you attribute to the right to use the name of Seattle Brewing & Malting Company as of March 1, 1913, in the State of Washington, together [285] with its sales organization, together with its customers, together with its going concern value?

A. It would depend how much money they made without the name Rainier. They might give nothing for those things if it didn't support the physical assets.

Q. I don't want a "depend" answer. You are familiar with the facts as of that date. I want you to fix me a value.

A. I can't fix you a value on that.

Q. You can't fix it.

You have heard the expression used in this hearing, namely: "captive saloons"? A. Yes.

Q. Now, being in the brewery business, will you explain to the Court what the term means, Mr. Weber?

A. Well, it might mean that they control

(Testimony of Cornelius G. Weber.)

licenses, and they might control—not "control", but might put in bar fixtures or things of that sort and have a saloon under obligations. In some instances that may have been the case.

Q. Now, you say "might have." Now, that is a rather indefinite answer. You are an expert on some things. You ought to know thoroughly.

Is it a fact that the brewers at March 1, 1913, and at the present time, for that matter, engaged in the practice called financing saloons? [286]

A. There were some, yes, sir.

Q. Now, I take it, Mr. Weber, you examined the books and records of the Seattle Brewing & Malting Company as of March 1, 1913?

A. Those that were available to me I examined.

Q. Very well. And I assume your able counsel made the books available to you, did he not?

A. He made available to me certain records that have gone in as exhibits.

Q. And the officers of the company, knowing you were searching for a true answer here, made the books available, did they not?

A. When you say "books"——

Q. (Interposing) I didn't ask you that. I asked you if the officers of the company assisted you in any way in making the books available? Can you answer that question?

A. May I ask you what you mean by "books"?

Q. Well, the books and records of the Seattle Brewing & Malting Company?

(Testimony of Cornelius G. Weber.)

A. The records I have are records prepared by accountants. I didn't go to the original books.

Q. Very well. Now, let's see how imaginative or resourceful you were, then, as an expert.

Did it occur to you to ask Mr. Mackay or his clients how many captive saloons Seattle Brewing & Malting Company were [287] financing as of March 1, 1913?

A. I don't believe—they might have had that available. I didn't ask for it.

Q. And it didn't occur to you to ask them that fact?

A. Yes, it occurred to me, but the details back at that time, one could get so buried and involved, within the practical limits of work of this kind, which could go on for years if you hounded the last detail, I didn't go into all of those details.

Q. In other words, the substance of what you have just said since your opinion of March 1, 1913, is so confused that we cannot pay much attention to it? Is that the effect of what you said?

A. No, it was not based on details. It was based on the broad outlines.

Q. Based on the broad outlines, then?

A. Yes, sir.

Q. In other words, your opinion was based on broad outlines rather than specific and detailed facts?

A. Detailed facts make the broad outlines; little drops of water make the ocean.

Q. And you didn't think enough, though, to find

(Testimony of Cornelius G. Weber.)

out what the chemical analysis or the facts were with respect to the little drops of the water? That is the way it look to me. Is that right? [288]

A. You couldn't tie them up with the total. You can't from those details, draw a broad conclusion.

Q. Now, Mr. Weber, I must not let you get me off the track.

How many captive saloons——

A. (Interposing) I don't know how many captive saloons.

Q. Let me finish my question now.

How many captive saloons was Seattle Brewing & Malting financing as of March 1, 1913?

A. I haven't got the number.

Q. You haven't got the foggiest idea, is that right?

A. No, I haven't got the number, a clear idea of how many they had, if they had any. I presume they had some.

Q. Well, you feel sure, though, as a brewery expert, they might have had some?

A. They might have, but I wouldn't say they had.

Q. Well, now, you had some relation to a brewery. In fact, you have got an interest in a brewery, isn't that right?

A. We never had one saloon in a brewery.

Q. I didn't ask you that question. But you do operate a brewery or have got some interest in it?

A. That is right.

(Testimony of Cornelius G. Weber.)

Q. What happened to your brewery during prohibition, [289] incidentally? A. Dead.

Q. Dead?

A. Absolutely dead, and paid taxes to keep——

Q. (Interposing) And when did you bury it? Now, let's find out. A. Bury it?

Q. Yes.

A. In January, 1920; January 16th, to be exact.

Q. National prohibition came into effect?

A. That is right.

Q. And if your brewery had been in Seattle, Washington, you would have buried it when?

A. I wouldn't have buried it. We really didn't bury it; we kept our corporation intact, and when we revived in '33—and I don't think I would have buried that either, because the issue was not settled then, and it is still going on, the controversy.

Q. Well, we won't bury the brewery, but the brewery would have been dead as of January 16, 1920?

A. It would have been asleep, I would say.

Q. Well, asleep. Then you want to retract your previous description of the effect of prohibition?

A. The practical facts are we did not bury our property, we kept it up. [290]

Q. Even though it was dead you just let it lay around? A. We kept it in repair.

Q. Do you know how much money you spent on your brewery during prohibition?

A. No, I don't recall. It was a family affair.

(Testimony of Cornelius G. Weber.)

There were records kept, but I know I sank in a lot of money to keep it from——

Q. (Interposing) Well, how much money?

A. Well, I don't recall.

Q. Oh, you have got some idea?

A. Well, personally I spent a couple of thousand dollars.

Q. A couple of thousand dollars? A. Yes.

Q. What is the brewery worth?

A. G. Weber Brewing Company.

Q. No, I say what is it worth, what is the value?

Mr. Mackay: He didn't understand the question.

A. What is the value of it?

By Mr. Neblett:

Q. Yes.

A. What do you mean? Market value? Cost?

Q. No, what is the book value of it?

A. I haven't the figures with me now.

Q. You don't know the value of your own brewery? How [291] do you expect to value another man's brewery?

A. Well, I think I have a fairly good idea what the value is, but if you are talking about the physical property, what it was appraised at, or what the business would sell for, well, I would say offhand that if anybody would offer $100,000 for it he probably wouldn't get it.

Q. You spent $2,000 on it?

A. During prohibition.

Q. Probably to keep the roof?

(Testimony of Cornelius G. Weber.)

A. That is right. I didn't spend any unnecessary money during that time.

Q. Is it not a fact, Mr. Weber, that 80 per cent of the breweries as of March 1, 1913, were financing what is known as captive saloons?

A. I wouldn't know the percentage at all. I wouldn't know whether it was 80 per cent or 10 per cent.

Q. You made no investigation in that respect at all?

Incidentally, would you say that the captive saloons constituted a part of the goodwill of Seattle Brewing & Malting Company?

A. I think that I would say that that figure that I have put on is over and above anything of that order that they may have had.

Q. So you didn't consider that?

A. What is that? [292]

Q. As a part of the goodwill of Seattle Brewing & Malting Company?

A. I didn't consider that as part of the element that I appraised, no.

Q. Do you know whether statewide prohibition which came into being December 31, 1915, continued on in the State of Washington until national prohibition became effective?

A. No. In 1916, I think, January 1, 1916, I think it went into effect in Washington.

Q. Now, my question is: Did it continue in effect in the State of Washington until national prohibition became effective?

(Testimony of Cornelius G. Weber.)

A. Did prohibition continue in effect, do you mean?

Q. Yes, on January 16, 1921?

A. Yes, yes, it did continue.

Mr. Neblett: National prohibition, I want the record, your Honor, to show became effective January 16, 1920.

I stand corrected, Mr. Weber.

By Mr. Neblett:

Q. Mr. Weber, in arriving at your value of $1,000,000 did you use a formula of six times earnings to get at the goodwill value?

A. I didn't use a single formula. I drew a conclusion after making certain tests which involved formulas, but no single formula. That was just one factor, as I mentioned the [293] other day. That was one test I made of several tests.

Q. So the formula, a 6 per cent formula, was not applied in the case, is that right?

A. It was applied, but not as the sole consideration.

Q. But is your value based on the application of six times earning formula?

A. Value is based on judgment after making certain tests with formula and other considerations.

Q. Can you give us some case in which you used that formula as of March 1, 1913?

A. I have never made a valuation on a single formula, and if I were to name the cases in which I have applied tests, formulae, and so forth, why, I would have to look into my records and go into all

(Testimony of Cornelius G. Weber.)

of those to know where I used just that particular thing. I couldn't recall right now.

Q. You couldn't answer that now.

In other words, you didn't feel like—even though this was a normal and unorthodox and unique formula, you didn't feel it was necessary to check it before you brought it out here in the courtroom, is that right?

A. Oh, I have checked that in other ways, indeed, yes.

Q. I asked you if you ever used it before. You say you never have.

A. Yes, I have used it, but not as a formula to determine—to find a value as based on a single formula. [294]

Q. All right. Now, give us a case in which you used that formula so I can check it, if I feel like it is necessary, as of March 1, 1913, in a situation similar to the situation we have in the instant case.

The Witness: May I have that question, please?

(The question referred to was read by the reporter.)

A. Well, I can't recall any exact parallel of March 1, 1913. I have no exact parallels of this. These things are changing all the time. Every case is on its own merits.

By Mr. Neblett:

Q. So you just reached out and grabbed this formula out of the air, is that about it?

A. Indeed, no.

(Testimony of Cornelius G. Weber.)

Q. Mr. Weber, I am going to test a little further your million dollar value as of March 1, 1913.

When you formed that value were you aware of the fact, Mr. Weber, that this right and certain other rights under a contract of 1935 had been sold to Seattle Brewing & Malting Company of Washington?

A. You mean like the brewery property, and so forth?

Q. Yes. A. Yes, sir.

Q. You had read that contract over, had you not?

A. I had the essence of it only. I did not have the [295] full and complete details.

Q. Did you call for the contract and read it, or anything like that?

A. I didn't have it available.

Q. You knew about the contract, didn't you?

A. Yes.

Q. And you knew that Seattle Brewing & Malting Company paid a million dollars to Rainier, didn't you? A. That I knew.

Q. You knew that, didn't you?

A. I knew that, yes, sir.

Q. I notice here, in arriving at the March 1, 1913 value, you come to the exact figure of a million dollars. Was that just a coincidence or an accident, or just what was that?

A. Figures of that kind are in round sums. There is no man who can estimate anything of this kind with mathematical precision. It is just im-

(Testimony of Cornelius G. Weber.)

possible. It is a judgment figure, and I knew that they paid a million dollars.

Q. Yes.

A. Now, I wouldn't have any value of $990,000 or $1,050,000, as some of these things indicate, but a million dollars would have been a reasonable figure at March 1, 1913, and I think I have considerable support for that in considerations here that have been brought out. [296]

Q. Just a minute. Being in the brewery business (it now is a lucrative business) you knew if you reached a value of a million dollars for this March 1, 1913 goodwill that it would have a tendency to wash out all tax on this million dollars, didn't you?

A. I don't know what it would have washed out, whether it would have washed out all or not; but presuming that it would wash it out——

Q. Yes.

A. (Continuing) ——it wouldn't change my idea if I thought that the supporting facts were a million dollars. And if I had thought that the supporting facts were less I would have made it less. If I thought the supporting facts would be materially more, then I would have raised it because——

Q. (Interposing) I was a little interested (and it does have some bearing on your bias and prejudice) in just how you got to the exact million dollars that the right sold for.

A. The exact million dollars?

Q. It didn't vary a penny?

(Testimony of Cornelius G. Weber.)

A. Why, no. You get different tests that show very odd figures. But you wouldn't say "Well, this figures out to be $385,641.41," and say "That is the value." You can't make appraisals down to such fine points. The thing to do is [297] say a million dollars, nine hundred and seventy-five, nine hundred and fifty, a million twenty-five, a million fifty, round figures like that. I don't think it would be sensible to try to get anything like that so precise. No man is that good. He can exercise his judgment when he gets through. And there are a good many things that would substantiate much more than a million dollars, many more factors in here if they were brought out.

Q. The point is, Mr. Weber, the fact that you found exactly a million dollars makes me suspect or draw the inference that your million dollar value may have been somewhat influenced or forced by the fact that you knew this million dollar property would be washed out?

A. I think I have indicated one reason for a figure of a million dollars in specific facts, and I do not think that that is the guiding principle here at all because I can take it or leave it. I am free to do in these valuations what I see fit. No one is dictating to me what figures I have got to put in. I am absolutely independent. And there is many a time I just turn a figure down. I think the value is there.

Q. You didn't turn this down, though?

A. No, sir.

(Testimony of Cornelius G. Weber.)

Q. You came up with a million dollar value?

A. Yes, sir. I didn't turn it down because this thing [298] looked to me like a unique thing that was worth a lot of money.

Q. Yes, sir. And is it not a fact that you brewery men sort of have a tendency to stick together, Mr. Weber?

A. I don't know of any sticking together. We have been hanging out on a limb by ourselves for 92 years. No sticking together, nothing.

Q. You haven't been here for 92 years.

A. When I say "92 years" I mean our family. And it is quite a record, 92 years.

Q. Now, let's just test your expertness for a minute, Mr. Weber. Come down to 1934.

I withdraw that question at this time, your Honor. I may come back to it later.

What actual sale of trade names do you know about, Mr. Weber?

A. Well, I know Dodge sold to Chrysler for $150,000.

Q. When was that?

A. Good will. That is quite a number of years ago, and I don't recall the exact date.

Q. $150,000?

A. $150,000,000 I mean to say, good will.

Q. Yes.

A. $150,000,000. And I don't suppose the Coca-Cola name could be bought for any money in sight. But I don't [299] recall any particular brewery

(Testimony of Cornelius G. Weber.)

trade names that were sold, and if they were it wouldn't necessarily be indicative of this.

Q. You don't know of any possibility of a law being passed so they couldn't make automobiles, do you?

A. A law? Well, I know there has been a decree, or a ruling that they couldn't make automobiles for commercial purposes during the war.

Q. I mean as of normal times, not as a war emergency?

A. Oh, no, no; no, indeed, no.

Q. But that was the situation with respect to the brewery business as of March 1, 1913, was it not? A. That they could pass such a law?

Q. Yes.

A. I don't know whether the constitutionality of the law would have—I don't think it would necessarily follow that you could conclude at that time that it would be constitutional. Probably a law could be passed, but whether it would be constitutional would remain to be tested by the Courts thereafter.

Q. That is somewhat unresponsive, but we will let it go.

Mr. Weber, where were you in 1912 and 1913?

A. In August, 1912, I left Janesville, Wisconsin, and went to Great Falls, Montana, and I stayed in Great Falls——

Q. (Interposing): I didn't ask you—Did you live [300] there, I mean?

A. I lived there, yes.

(Testimony of Cornelius G. Weber.)

Q. Now, how about '13, 1913?

A. In Stockett, Montana, which is 18 miles out of Great Falls, where I was superintendent of automotive power for the Cottonwood Coal Company.

Q. That had nothing to do with beer, I take it?

A. That had nothing to do with beer, no; strictly engineering.

Q. And when was the first time you ever went to Seattle, Washington?

A. I went to Seattle, Washington, last March.

Q. March 1, 1944? A. 1945.

Q. '45, yes. That is the first time you ever went into the Northwest?

A. Well, I have been here in the Northwest, but the States of Oregon and Washington were two of the six States I had not visited.

Q. And all the information you got as of March 1, 1913, then, came by your research rather than by personal knowledge that you might have had as of March 1, 1913?

A. I didn't live there on March 1, 1913. I don't think, but a few of us probably did, some of the gentlemen that were connected—— [301]

Q. (Interposing): Now, Mr. Weber, your value was based on earning figures for the fiscal year June 30, 1912, I believe, is that right?

A. As an indication of the status the company had reached.

Q. Yes.

A. Not just that figure, but that figure as an indication of what the general situation was.

(Testimony of Cornelius G. Weber.)

Q. Yes.

A. I marked up the assets somewhat, and I reduced the profit somewhat as a fair and reasonable indicator of the existing status.

Q. And is it not a fact that earnings for the fiscal year June, 1913, would show a trend——

A. (Interposing): They showed a little less profit in the following year, and a little less——

Q. (Interposing): A little less favorable trend?

A. Yes, but those figures weren't available for March 1, 1913.

Q. You didn't ignore that trend?

A. I didn't ignore it, no. I looked at that.

Q. And "trend" means a down movement, doesn't it, I mean if it is that way? If your earnings were less that would be a downward trend, would it not?

A. If you talk about a "trend"—— [302]

Q. I didn't ask you that. I asked you if a downward trend would be reflected by earnings, if the earnings were less?

A. I can answer that only by saying "Yes" or "No."

Q. All right.

A. Basic trend and momentary trend.

Q. All right. A. It is not——

Q. (Interposing): It is "Yes" or "No," whichever suits the case, I take it?

Mr. Mackay: If your Honor please,——

Mr. Neblett (Interposing): If your Honor please, I think the question was proper.

(Testimony of Cornelius G. Weber.)

Mr. Mackay: I think that a year's earnings doesn't indicate a trend.

Mr. Neblett: We think they do.

Mr. Mackay: Go to '14.

The Witness: What about '14?

By Mr. Neblett:

Q. We will stick to '15 for a while. But if the earnings were less in 1913 than they were in 1912, that would show a downward trend, is that not right? A. Momentarily, yes.

Q. Now, Mr. Weber, were not conditions in 1913 entirely different from what they were in 1935?

A. Basically, those factors that continue in this situation, I would say "No," except for the fact we had no income taxes at that time, profits were not taxed, and a dollar, of course, bought a whole lot more than it did now, but, after all, an investment, a yield from an investment—well, you really had more left in 1913 than you had in 1940. I would say there was that big basic difference.

Q. There was no threat of prohibition in 1935, was there, Mr. Weber, in the brewery industry?

A. Yes, the threat is even now, there is always that threat, and that threat has been going on for a hundred years.

Q. All right, let me see how good a prognostic you are. You prognosticated in 1913 we wouldn't have prohibition in the State of Washington, and we had it in 1913. Now, let's give you another chance.

(Testimony of Cornelius G. Weber.)

When do you think we will have prohibition again?

A. I have no crystal ball. I couldn't say when or whether. I wouldn't know.

Q. Let's have a prognostication on it.

A. I wouldn't attempt such a prognostication. I just continue to believe,—well, there is things going on. There is nothing written in the cards now, that I would have any particular fear. But, my good lands, when we were selling scrap iron to Japan we didn't prognosticate we would have war. [304] I couldn't prognosticate that.

Q. Do you think we will have prohibition in ten years?

A. I don't think that at all, no, I don't.

Q. Well, let's slip up another ten; twenty years?

A. I have no opinion as to whether we will or won't, except that the current situation is such that I wouldn't have any fears, but to try to predict that there would or wouldn't be, I wouldn't say that.

Q. Now, I will try to point up to you, Mr. Weber, the 1913 date and the 1940 date. Now, will you say whether or not the situation in '13 was any different from what it was in 1935 and 1940?

A. Well, there might have been a little more fear at the time.

Q. What time?

A. Well, about 1908, and then in 1909 to 1914, when there was an ebb, and we had had three big waves before, and this thing being on the down grade, I really wouldn't say that as you could see

(Testimony of Cornelius G. Weber.)

it at that time, that there was any very big difference. I wouldn't say so. That difference became pronounced in '15 and '16. That was different.

Q. Let me put it this way: Do you think there was more threat, after looking at these maps I have shown you, in 1913 of prohibition than there was in 1935?

A. Maps take in more ranges and things of that kind, [305] and just the big patches there. Without reading into the literature of that I couldn't judge what those maps meant.

Q. Well, forget the maps. Do you think, then, that prohibition was more imminent as of March 1, 1913, than it is now?

A. Retrospectively that may be true.

Q. I didn't ask you "retrospectively."

A. But at the moment, no.

Q. That was your judgment as of 1913?

A. That is why my father spent a lot of money to fix up our plant. Yes, that happened to be the judgment. We found out later on there were potentialities we couldn't see at the time.

Q. How much money did your father spend?

A. I don't recall. We built a new brew house; we built a new bottle house.

Q. How much did you spend rebuilding that house? Have you got some idea of how much you spent?

A. Well, a small brewery, I imagine, at that time——

Q. (Interposing): You imagine?

(Testimony of Cornelius G. Weber.)

A. Those prices were less. Well, I haven't got the figures with me, and prices were different, and so forth, and that is a long, long time ago.

Q. Well, can't you estimate it for us?

A. Well, maybe, twenty, twenty-five thousand dollars [306] for a small plant in Wisconsin at that time.

Q. It might have been five thousand, is that right?

A. Oh, no, it was more than $5,000.

Q. You have heard of a Mr. Emil Sick in Seattle, have you? A. Yes, I have.

Q. Quite a well known man in the brewery business, isn't he? A. Well, I think so.

Q. You say you think so. Don't you know so?

A. No; I don't know him personally.

Q. Haven't you ever met him?

A. No, I have not.

Q. Do you mean you went up to Seattle investigating the brewery business and didn't call on Emil Sick? A. I mean to say that.

Q. It amazes me.

What is Mr. Sick's position in the Seattle Brewing & Malting Company?

A. I think he is President, if I am not mistaken, or is the head man; Chairman of the Board, or President; one of the two.

Q. Well, isn't the Seattle Brewing & Malting Company at the present time one of the bigger brewing companies in that neighborhood? [307]

A. Yes, it is a fair-sized outfit, yes, sir.

(Testimony of Cornelius G. Weber.)

Q. Well, didn't your knowledge of the brewery business tell you that Mr. Sick had been in the brewery business all of his life and was practically one of the best informed men in it?

A. Well, that is all hearsay evidence, what people tell me existed at that time, when it isn't of record, is a matter of history, recorded history, like Dr. Colvin's books, like recorded construction news, and things of that kind. And if Mr. Sick would tell me something, and I would tell the Court, "This is what Mr. Sick said," then Mr. Sick ought to testify. I can't rely so much on just asking people questions and then come in Court and say, "This is what I was told by so and so." I don't consider that——

Q. (Interposing): Let me test your method there just a little bit. After all, your method counts for a lot.

What distinction do you make from reading it out of a book where you have no chance to cross-examine the author and being in a position to talk personally to Mr. Sick where you have a chance to ask him these questions? Why would you make a distinction in favor of the book?

A. I would consider that a man of the apparent character of Dr. Colvin going on record before the public would sit down and try to be dispassionate and as fair as possible in recording the events of the past, when he can [308] review and sift out in light of the facts much better known afterwards, after the event, we know, that prohibition went into

(Testimony of Cornelius G. Weber.)

effect in spite of indications to the contrary. And when a book like that is accepted by a publisher, and so forth, and put out——

Q. (Interposing): Mr. Weber, you have told us that half a dozen times.

A. (Continuing): That it carries more weight with me than to just quickly ask somebody a few questions. He has not even got time to think and has not got the facts clear in mind, well, he says something and you put it down. I don't accept those things so readily.

Q. Don't you feel sure Mr. Sick would have given you a hearing if you had asked for one?

A. I doubt it very much. I don't know.

Q. You mean one brewery man wouldn't give another brewery man a hearing?

A. Maybe not. He might, and he might not.

Q. Anyhow, you didn't ask for a hearing?

A. No, I didn't.

Q. Do you know whether Mr. Sick spent any money advertising the name Rainier after he acquired it under the contract of 1935?

Mr. Mackay: If your Honor please,——

A. (Interposing): I assume he would have to keep the [309] name alive.

The Court: Just a minute, please.

Mr. Mackay: I haven't objected, and I don't want to at all interfere with an effort to test a man's credibility, but it does seem to me that when we get down to years subsequent to 1935, the man did not investigate—he was asked now whether he ad-

(Testimony of Cornelius G. Weber.)

vertised. Advertising expenses entirely beyond this scope, not proper cross-examination.

The Court: What do you mean? It isn't proper to ask whether he investigated?

Mr. Mackay: No, I mean the advertisements paid in '35 to '40. It seems to me that that is immaterial. I have no particular objection to it. It seems to me he is far afield in asking that. The man has already testified he never saw Mr. Sick.

The Court: The objection is overruled, if it is an objection.

Can we take a recess now?

Mr. Neblett: Very well, your Honor.

(Short recess.)

Mr. Neblett: Your Honor, just a few questions and we will be through with our cross-examination of this witness.

By Mr. Neblett:

Q. Mr. Weber, I understood your value of $1,000,000 [310] was based on having the Seattle Brewing & Malting Company continue to manufacture beer for the potential buyer; is that right?

The Witness: Would you read that?

(The question referred to was read by the Reporter.)

A. Not entirely; sale value, sale value of that name, and it would be the same for the owner as for the buyer.

(Testimony of Cornelius G. Weber.)

By Mr. Neblett:

Q. I don't think you understood my question, Mr. Weber. A. Maybe not.

Q. I believe your testimony shows that net assets, tangible assets were approximately $2,900,-000; is that about right?

A. That is the grand total net assets of the company.

Q. All right. A. That is right.

Q. Now, to make it perfectly clear, what would the Seattle Brewing & Malting Company have done with assets of approximately $3,000,000 when they sold the name "Rainier?

A. It could have been very easily accomplished in this way: Sold the cream of the business, and they would have retained the business in outlying States. They could have done several things. They could have made—reorganized the [311] company, in which each side might have taken shares of stock, or the owner, the purchaser of the name Rainier might have made an arrangement whereby they would brew the beer for them under their own supervision and pay so much per barrel, so that they could have been in two entirely different companies, one operating in Washington and one without, and the brewery could have just been kept intact that way. That would have been one way to do it.

Q. Now, Mr. Weber, is it not absurd to say (in fact, ridiculous) that Seattle Brewing & Malting

(Testimony of Cornelius G. Weber.)

Company would sell the name Rainier and then continue to make beer for the potential buyer?

A. I would say that I doubt very much if they would have severed that business for a million dollars. I think that it is quite possible that they would have demanded a whole lot more before they would have actually separated with it that way. I think that is quite right.

Q. Yes. Is it not a fact that the Seattle Brewing & Malting Company, sitting there with a three-million-dollar business, could have caused the purchaser of the name Rainier to be in a position that he couldn't make any money at all?

A. The company could have caused that?

Q. Yes, caused that situation?

A. Well, if they would have wilfully put in barriers that would kill a deal, why, yes, in that sense they could [312] have done so. But presuming that willing buyers and willing sellers, and some practical arrangements of taking over the name, why, I think this would have been a very practical arrangement. In fact, I——

Q. Well, you don't think Seattle Brewing & Malting Company would have abandoned a three-million-dollar brewery business just because they told the name Rainier, do you?

A. They wouldn't have to abandon it.

Q. Suppose the Seattle Brewing & Malting Company were to have continued to operate its brewery, and they put beer out to their captive saloons, what

(Testimony of Cornelius G. Weber.)

position would that put the potential buyer in of the name Rainier?

The Witness: I don't think I understand your question.

Mr. Neblett: Read that, please.

I will reframe the question and make it a little simpler.

By Mr. Neblett:

Q. Seattle Brewing & Malting Company sold the name Rainier to a potential buyer?

A. Yes, sir.

Q. The brewery retained its three million dollars worth of assets A. Yes, sir.

Q. It financed a lot of captive saloons. [313]

Could not the Seattle Brewing & Malting Company put out beer under another name to its captive saloons, and the potential buyer that you talk about would have been very much handicapped in trying to sell beer in the State of Washington?

A. With very great difficulty, if they would have done that. That would have been a most difficult thing to do, to introduce a new name that the public doesn't know, because you can't force your sales too much through a saloon keeper. There has got to be a demand from people that know a thing by a name, like Schlitz, or Anheuser-Busch, or whatever the big names are. And if something else were just as good or better, they wouldn't know about it, and they wouldn't ask for it.

Q. Is it not a fact that this potential buyer that

(Testimony of Cornelius G. Weber.)

you talked about would have to spend considerable money building a brewery, or making arrangements of some kind to have beer manufactured by some other concern? Is that not right?

A. He would have to make some arrangements with the Seattle Brewing & Malting Company, if he wanted to buy it for a million dollars, if he would want it, and at the same time not go in for any other arrangement. He would have to pay more, and pay more on the order of what they did pay in 1940, where, for a saving of less than a hundred thousand dollars a year at that particular time he paid a million [314] dollars and capitalized it at less than 10 per cent. And I think that if he would just definitely want to produce it in a new brewery that he would have had to pay more than a million dollars, because I don't think that they would have considered sacrificing physical property for the sake of accepting the million dollars.

Q. You don't think the Seattle Brewing & Malting Company would abandon a brewery plant worth approximately three million dollars in order to sell the name Rainier, do you?

A. No, I don't think they would abandon it, I don't think they would. That is why I think they made some arrangement like I have indicated here.

Q. You think probably the Seattle Brewing & Malting Company would continue in the beer business, don't you?

A. For a big enough price you would sell that and continue in the beer business in a smaller way,

(Testimony of Cornelius G. Weber.)

I would think that, because every commercial thing of this sort has a price; some price will reach it.

Q. Now, just to test your thinking a little further, Mr. Weber: What, in your opinion, would this name Rainier have sold for in the State of Washington after State-wide prohibition came into effect in that territory?

A. I have no opinion as to the value except that I think it would have been materially less in the State of Washington after prohibition. I think that is very obvious. [315]

Q. Well, how much less, now? Let's get some opinion.

A. I don't know. I don't know. It would have had some price in the hopes that this was not permanent, but I have made no investigation as to what I would have thought at that time if it had been offered for sale.

Q. All right. A. I don't know.

Q. You don't have an opinion on that at all? You didn't make any investigation of it?

A. No, I have not; no, I have not.

Q. It didn't occur to you that that question might be asked of you at this hearing?

A. Sir?

Q. It didn't occur to you that that question might be asked of you at this hearing?

A. No, because it is so obvious that after unforeseen events developed that the name at the time when it was dormant would have been impaired materially.

(Testimony of Cornelius G. Weber.)

Q. Well, would you say it would be impaired to the extent of $800,000?

A. Well, it might have. I am not—I haven't any decisive opinion. I wouldn't be surprised at all.

Q. Well, now, after national prohibition came along January 16, 1920, would you say the good-will value of the name Seattle Brewing & Malting Company would have been [316] impaired still a little further?

A. Not only a little further. It would have been decidedly impaired. That is obvious.

Q. Exactly.

A. I don't think that there is any question about the subsequent events proving that.

Q. And then if you had been called upon—if some fellow had come out here in '22, we will say, after national prohibition became effective and had some good money and asked you, we will say as an expert, to advise him what he could pay for that name, what would you have advised?

A. In what year?

Q. In 1922, after national prohibition became effective?

A. I don't know what I would have advised him. If there had been any clear indication in 1922 that there would be a reversal of sentiment, I might have had an opinion, have a certain opinion, and if the sentiment would be such that prohibition was going to be permanent and irrevocable, in other

(Testimony of Cornelius G. Weber.)

words, if that would have been an absolute surety, that would have been very low.

Q. I am assuming that you are familiar with the sentiment now.

A. No, I am not. I did not make a study of the sentiment in '22.

Q. Didn't pay any attention to that at all? [317]

A. No. I had my work to do. I was not sitting there making studies on prohibition in 1922. We deplored the fact that we lost a very substantial amount of money, and then in the agricultural depression our farms did not produce anything, and we were worried about that, but we did not sit down and study the question.

Q. I am not asking you for your opinion formed in 1922. I am asking you for your opinion of what that value would be, formed, we will say, since you have been working on this case?

A. I didn't value this for every year from 1913 forward. I didn't value that in '22. I don't know.

Q. All right, let me ask you the specific question:

In your opinion, what was the goodwill value of this trade name Rainier after national prohibition became effective, immediately after national prohibition became effective January 16, 1920?

A. I don't know. They might have made some near beer under that name. There might have been some modifications of the Volstead Act. There might have been different things in the cards that I just

(Testimony of Cornelius G. Weber.)

don't know what they were. I can't put a value on it. It would take quite a little study.

Q. It would be materially less, though?

A. I am quite sure that it would be materially less.

Q. It might have been worth—— [318]

A. (Interposing) It might have been anything.

Q. It might have been $900,000 less?

A. It might have been, it might have been.

Q. It might not have been worth anything?

A. No, I wouldn't think that, unless the thing was absolutely certain, that there would never be a return.

Mr. Neblett: That is all.

Mr. Mackay: There is no redirect.

Call Mr.——

The Court: (Interposing) Just a minute.

Mr. Mackay: I am sorry, your Honor.

The Court: Mr. Weber, I would like to ask you one or two questions about the factors that you took into consideration in determining your value of goodwill because I do not think, from your testimony, that you took into consideration any other factors excepting the following: It is my understanding that the only factors you took into consideration were the earnings of the business for a certain number of years prior to March 1, 1913; the ratio of sales of beer in Washington to total earnings of the business.

I think those are the only two factors which figured very much in your computation.

(Testimony of Cornelius G. Weber.)

As I understand it, your opinion of value was based on a mathematical computation almost entirely; isn't that correct? [319]

The Witness: No; I have gone beyond that. I indicated a test.

The Court: Well, then, will you please state what factors you took into consideration, and by that I mean factors in the sense of elements, that is, elements that you can describe in simple terms, using the term earnings or something comparable.

Now, what factors—using the word "factors" in that sense—did you take into consideration in arriving at your opinion of the fair market value of the goodwill involved in the name Rainier, or whatever else you considered was involved in the goodwill of the business in the State of Washington?

The Witness: One factor here is sales of 172,000 barrels approximately.

The Court: Now, I asked you to please try answering my questions by using simple terms that would describe your factors.

Now, you have started in, you took into consideration sales. All right, that is a factor.

What sales?

The Witness: And royalty, a reasonable royalty.

The Court: What sales?

The Witness. Oh, the sales of beer in Washington on a barrel basis. [320]

The Court: What royalty?

The Witness: On the basis of a 75-cent royalty, which is all the way from 75 cents to a dollar higher

(Testimony of Cornelius G. Weber.)

than a normal profit on beer, and applying that to 172,000 barrels, that would be $129,000 of royalty indicated thereby.

The Court: What was that last figure?

The Witness: $129,000 a year would be indicated by such royalty.

The Court: Yes.

The Witness: Now, if you capitalize an income of that kind at around 12-1/2 per cent, which would be an earnings multiplier, a multiplier of 8, the equivalent, you get $1,032,000. so the equivalent release from royalty would indicate something on the order of a million dollars. Another thing I took into consideration was stocks in breweries and other enterprises at that time, March 1, 1913, and——

The Court: (Interposing) You mean common stocks or preferred stocks?

The Witness: Common and preferred. And in that connection I have made a rather exhaustive analysis of comparisons (I am sorry to say it is a chart that would require full explanation) to show why the value of the assets in toto on this brewery at March 1, 1913, would be about 160 per cent of the book value (I am speaking of the assets assignable to Washington), and if those assets were taken at [321] $1,750,000, and you apply 160 per cent to that, you get $2,800,000, and deducting therefrom $1,750,000, you also have $1,050,000.

The Court: Now, let me go over that with you again.

As you said yesterday, you assigned some of the

(Testimony of Cornelius G. Weber.)

assets of the total business to the business in Washington, you figured that the value of those assets was about 160 per cent of the book value.

The Witness: That is right.

The Court: And so figured, that the value of the assets assigned to the Washington business was $1,750,000.

Then you capitalized that, is that right?

The Witness: I take the $1,750,000, and on the basis of that comparison to these other stocks, it would have sold at 160 per cent of the book value, and 160 per cent of $1,750,000 is $2,800,000, which is $1,050,000 in excess of $1,750,000. So that is indicative of a million dollar value.

Then I considered it from this standpoint:——

The Court: (Interposing) I think you had better explain why you were comparing the—it is an involved process there. You took into consideration the market quotations for securities being sold on the market, securities of other brewery companies? [322]

The Witness: Yes, there were only two breweries with earnings and dividends at that time, and a winery. Unfortunately, they had no such earnings as Seattle Brewing & Malting Company. I, therefore, took some 1913 comparisons with other kinds of companies like American Tobacco Company, and so forth, and after seeing where these lined up in a type of chart that shows consistent relationships, stock prices, earnings and book value, I investigated the general situation in 1940 and 1913. In

(Testimony of Cornelius G. Weber.)

both of those years we had just emerged from a somewhat sub-normal business into business slightly above normal.

Then in the absence of breweries at that time that were making big money, and were published and had stocks on the market, I tested to see about how the 1940 conditions would match with 1913, and I found that the mean of the market prices of stock in 1940 we charted on this type of a chart matches up and falls right in line with the breweries for which I had statistics of 1913, which, to me, indicated that in 1940 and in 1913 you would have paid about substantially the same prices relatively, that is, for the two years. And, therefore, taking my 1940 breweries with 1913 statistics of breweries, a winery and other companies, I get a sequence that is entirely consistent with many charts of this kind that I have prepared and have submitted in tax cases before; in one I testified. And knowing that I have 20 per cent [323] on the net worth, that if the value of these assets on the market were known they would chart on the chart where the arrow is, and that indicates 160 per cent of the net assets.

Now, that was another way of arriving at it, but there is still other things that I considered.

I believe that in 1940, that, after all, we had income producing investments, then we had income producing investments in 1913, but in 1940 the income was taxed. In 1913, March 1st, it was not.

Now, the purchase in 1940 at a million dollars on the basis of royalties that had not yet reached $100

(Testimony of Cornelius G. Weber.)

meant a saving of from 98 to 100 thousand dollars a year under the then current conditions. Capitalizing the taxable saving, it is less than 10 per cent, and if this brewery—I don't know how much tax it paid, but assuming that it was as much as 20 per cent, the price they paid would represent a capitalization rate of practically as low as 8 per cent. Where I have worked with much bigger capitalization rates, I have found that stock market-wise the prices indicated payments on intangibles up as high, but those that I have analyzed, where the ratio was over 240 per cent of intangibles to tangibles.

I have found that what the Sick's Brewery, now the new Seattle Brewing & Malting Company, paid for this goodwill added approximately 82 per cent of the book value of the [324] tangible assets, where in this particular case it amounts to only 60 per cent on the tangible assets assignable to Washington for a larger volume of beer, for an income that was not taxable. And in considering what high figure 8 per cent and 10 per cent of this release from royalties in '40 would mean in dollars, away above a million, I concluded that this round sum amount was about as reasonable and close an estimate as one can make in matters of this kind. No single formula, no mathematicial precision. It just can't be done that way. So, after all, it is a matter of judgment which has been tested by the formulae and methods, but none of which I would take and start out the formula and say "I made this computation and here is the figure."

(Testimony of Cornelius G. Weber.)

I have figures that go up very high by some tests. But that is the way in which this was arrived at, making all of these different tests against it and then drawing a broad conclusion, not based on the single mathematics of any one thing.

The Court: I am not clear as to what you were asked to form an opinion of value on.

The Witness: The value of goodwill as associated with the trade name Rainier as of March 1, 1913.

The Court: In a transaction of what kind?

The Witness: Between a willing buyer and a willing seller, and each acquainted with the facts in the case, the [325] important available facts, presumably, you might say, all the facts, but I don't think there ever is anything in which all the facts are known. When people buy stock they don't know all the facts, but they know the basic underlying facts to a sufficient extent to act and make their commitments in money.

The Court: Of course, as an expert you are a practical man, aren't you?

The Witness: Practical and theoretical; both! I think that theory, if it is correct, and complete, meets with practice, and if it is incorrect, and incomplete, it does not. But I am a practical man. I consider myself such, yes.

The Court: What did that problem mean to you, the determination of the value of goodwill? What would a willing buyer be buying if he were buying goodwill?

(Testimony of Cornelius G. Weber.)

The Witness: The basic thing on which he could make earnings.

Now, understand, if he had the name alone and would try to sell beer but had no brewery or any means of getting beer, then obviously the only other thing he could do with it would be to lease it to somebody else on a royalty basis, somebody who had a brewery. But, presumably, it would mean that he would buy the use of the name in the State of Washington, and if he would want to run his own business, this would [326] carry with it the idea that he would either have to have a brewery, or would make some arrangements with the Seattle Brewing & Malting Company, or with some other company, that would permit him manufacturing.

The name is like the soul, and the plant is like the body, and the two go together under those conditions.

The Court: Well, that being true, that being your understanding of the problem, let me ask you this: Which one of these elements did you consider the most important in arriving at your opinion of values? The capitalization of royalties at 75 cents a barrel, or the second factor that you described, where you were looking into earnings and book values behind stock being sold on the Exchange in—I don't know in what year—maybe, 1940—at any rate, when you did undertake to find out whether market values of securities represented about 160 per cent of book values of tangible assets.

Now, I don't know how you really were applying

(Testimony of Cornelius G. Weber.)

that later kind of analysis to the problem of determining the value of the basic thing on which somebody could make money if he were buying the trade name Rainier. However, what I do want you to clear up for me, because I don't quite understand that, is which one of these factors did you rely upon the most, to which factor did you give the most weight?

The Witness: I think I gave practically—I would [327] say I gave practically equal weight to three things.

The Court: To the three elements, factors you have just described?

The Witness: That is equivalent release from royalty, the ratio of the value of the goodwill to the physical assets, because that seemed to be so well covered by what was paid for stock, and the fact that 60 per cent was relatively low compared to a goodly number of others. And I also considered when you are capitalizing anything at these high rates that I used, and they still meet the test, that I was on pretty solid ground, I do believe.

The Court: Well, turning now to your first factor of royalties, your idea was that a willing buyer of the goodwill of this business in the State of Washington (which you construe really to be a willing buyer of the trade name Rainier) would enter into a transaction to buy that goodwill only if he had his own brewery and was going to manufacture his own beer and sell it under that trade name, or, if he intended to sell to someone who did own a brewery,

(Testimony of Cornelius G. Weber.)

the right to use the name Rainier on a royalty basis; isn't that correct? Those are the two circumstances under which any willing buyer would buy the goodwill of the business in 1913 as the problem was presented to him?

The Witness: Not necessarily the only circumstances under which he would buy it, but the only practical circumstances, [328] I would say, in which the owner could have afforded to sell it.

The Court: I am looking at this from the standpoint of the buyer at the present time. That is the question that I have asked you.

Could you think of any other situation, imagine a buyer in any other situation other than the two I have suggested to you?

The Witness: He would have to have those arrangements of some kind in mind to exploit.

The Court: Those two situations?

The Witness: Yes.

The Court: I want to ask you another question. Now, I want to just settle on one thing now. So if you can think of another situation that you want to be considered in your next answer to the next question just suggest that one to me.

The Witness: Well, I think that would have been substantially the situation.

The Court: All right. Now, why did you think that "X," the willing buyer in this problem, could have turned around and sold to "Y" the right to use the trade name Rainier on a royalty basis of 75 cents a barrel on March 1, 1913?

(Testimony of Cornelius G. Weber.)

The Witness: Because they were making over $2 a [329] barrel.

The Court: Who was?

The Witness: The owner was making over $2 a barrel.

The Court: Well, now, what I want to know is this: I want to know whether you have been stressing in your analysis the decision of the seller to a greater extent than you have been considering the situation of that willing buyer?

The Witness: I do not think so.

The Court: Well, I am trying to find that out.

Now, you say that this going concern, the Seattle Brewing & Malting Company, had been selling beer at that time in such volume and under such favorable results of management that a 75-cent royalty per barrel would be all right. But I want to know if you took into consideration the market on March 1, 1913, in the State of Washington?

The Witness: I did in this way:——

The Court (Interposing): Well, now, let me ask you this: Did you inquire into whether there were any contracts around the time of March 1, 1913, of an analogous or similar type where any buyer was agreeing to pay a royalty of 75 cents a barrel?

The Witness: Well,——

The Court (Interposing): Now, just answer that "Yes" or "No." Did you?

The Witness: No; no. [330]

The Court: Was the Seattle Brewing & Malting

(Testimony of Cornelius G. Weber.)

Company the largest brewing concern in Washington in 1913?

The Witness: It was, to the best of my knowledge.

The Court: I wonder if you could tell me whether you made a study, a comparative study of the sizes of other brewing companies?

The Witness: The brewery companies at that time——

The Court (Interposing): In Washington?

The Witness (Continuing): ——didn't release so much on barrel figures at the time. I know that the Olympia Brewing Company was a fairly good sized brewery.

The Court: Now, "fairly good sized" for an expert statistician and an engineer, I wouldn't think you would use the words "fairly good sized." I would think you would say, if you had studied it, you would make a more exact comparison between the sizes of the Seattle Brewing & Malting Company in Washington and other businesses in Washington at March 1, 1913.

Did you make a——

The Witness (Interposing): Other business generally?

The Court: Other brewing businesses, the same businesses, but in the State of Washington?

The Witness: I made a record, got a record of the number of breweries in existence in Washington at the time. [331]

(Testimony of Cornelius G. Weber.)

The Court: Well, have you that record here with you?

The Witness: Yes. I would have to search for it. I have it somewhere. I can't lay my hands on it quickly, but I can turn that in a little later, and not take the time now. All right, I will look for it now.

The Court: Well, if it doesn't take too long. I would like to know if you considered the position of other buyers in the State of Washington around the time of March 1, 1913?

The Witness: At that remote time I——

The Court (Interposing): What I want you to tell me is to what extent you considered the buyer's position? What would a willing buyer take into consideration?

The Witness: A willing buyer would take into consideration the money he could make out of it. Now, there were people in Washington——

The Court (Interposing): Well, now, that is a generalization. A willing buyer in the State of Washington would have to be a very concrete man.

The Witness: That is right.

The Court: He would have to be a man who knew something about the brewing business.

The Witness: That is right.

The Court: And he would either be a man who had been [332] in the business before, or who was going into it for the first time in his life.

Now, I want you to tell me in that fashion the way in which you considered the position of a will-

(Testimony of Cornelius G. Weber.)

ing buyer when you arrived at a conclusion that a contract would have been made between a willing buyer and a willing seller on March 1, 1913, under which a royalty of 75 cents per barrel would have been paid for the use of this trade name Rainier.

The Witness: In the absence of a definite market comparable for a similar condition I measured the market in this way: that all over the country, including the State of Washington, people were putting money in breweries. In many large breweries they were investing money, which had no particular indication that it would earn anything like even 10 per cent on the tangible assets. Now, here was something that was earning 20 per cent, and——

The Court: What was? The goodwill was earning 20 per cent?

The Witness: No, they were earning 20 per cent on the tangible assets.

The Court: Who was?

The Witness: The Seattle Brewing & Malting Company was earning 20 per cent on the tangible assets in the State of Washington.

The Court: All right, go ahead. [333]

The Witness: And it was over $2 a barrel.

Now, I would consider a very good return a dollar to a dollar and a quarter a barrel, and people that were putting their money into the business for less a return—I am very convinced that 75 cents a barrel would be a better bargain on a royalty basis for this than putting money in permanent as-

(Testimony of Cornelius G. Weber.)

sets earning less, so that the 75 cents would look to me like a very conservative figure.

The Court: Well, now, I want to be sure that I interpret your statement correctly, and that I understand it correctly.

That means to me that a person who had the opportunity to buy the entire Seattle Brewing & Malting Company business, including its list of customers, its equipment, its location, as well as its name and reputation, would be in a very good position and would make a very good investment if he entered into a contract under which he was to make payments on the basis of a royalty of 75 cents a barrel.

That is my understanding of what you have just said.

The Witness: No, it isn't quite that. It means——

The Court (Interposing): Well, you are talking about what the Seattle Brewing & Malting Company business was earning, and its earnings were a result of a combination of management applied to its assets, and management included the ability to get customers, to keep them and to sell to them. [334]

Now, it still appears to me that when you adopted 75 cents a barrel on a royalty basis as a way of arriving at the fair market value of the goodwill of this business as represented by the name Rainier on March 1, 1913, that you certainly must have had in mind a form of contract, or the terms of a con-

(Testimony of Cornelius G. Weber.)

tract that would be entered into between the buyer and the seller.

The Witness: There would have to be some arrangement.

The Court: And did you then have in mind the terms of a contract that would be made on March 1, 1913, in this hypothetical sale between a willing buyer and a willing seller of the goodwill of the business, and, if so, what were those terms?

The Witness: Well, the only other—the only concrete term, outside of what arrangements, practical arrangements had to be made, would be you could readily pay 75 cents a barrel or more.

The Court: What is this? The only concrete term would be or could be that the willing buyer would pay 75 cents a barrel?

The Witness: Some practical means on the basis of which he could market beer.

The Court: Well, to what extent did you go into it later? [335]

The Witness: Well, it would just simply mean that the Seattle Brewing & Malting Company is turning the beer sales in Washington over to some other person, and this other person then makes arrangements with them whereby they produce beer for which he pays the cost of the beer, whatever way it is paid for, is produced, and then sells it, and takes the profit, but for every barrel he sells he pays them 75 cents royalty.

Now, that 75 cents royalty on 172,000 barrels is $129,000 a year, and that capitalized at 12½ per

(Testimony of Cornelius G. Weber.)

cent would represent something like a million dollars.

It is more of a test than possibly the practical way in which this whole thing would have developed in an actual transaction, because, after all, there was no actual transaction at that time.

The Court: Well, did you have in mind the contract that was made in 1940?

The Witness: I took that into consideration. There was some indication there. But the indication in 1940 was far above what I used here in 1940. There was not any such volume as this volume here. Here they paid——

The Court (Interposing): I don't know what you mean by "here," and what "volume."

The Witness: In 1940 the company that paid the million dollars for release from royalty was making only [336] about—well, these are approximate, an approximate figure—130,000 barrels, where the Seattle Brewing & Malting Company was making 172,000 barrels.

The Court: When?

The Witness: For the State of Washington in 1913.

Now, on a barrel basis the release from royalty at 80 cents for everything above $125,000, and 75 cents for everything up to $125,000, represents a much lower capitalization rate than I used, because if I would use 10 per cent on the release from royalty I would get $1,290,000. But considering also that the new company is taxed and probably gets

(Testimony of Cornelius G. Weber.)

only 80 cents out of every dollar it saves through release from royalty, why,—they capitalized it practically at 8 per cent, so $100,000 capitalized at 8 per cent, it would be well over a million and a quarter dollars.

The Court: Well, of course, the contract in 1940 had provisions in it, did it not, that related to more than the purchase of the goodwill of the business?

The Witness: Well, to make it——

The Court (Interposing): Is that true? Are you acquainted with that contract?

The Witness: Not the details. To make the thing practical, I would assume there would have to be other arrangements. You can't just take this thing out, pull it out and let everything else hang on a limb. It wouldn't be practical. [337]

The Court: I am trying to find out what those other things are that you would have assumed a willing buyer would have taken into consideration in 1913.

The Witness: Well, in 1913 he would have had to pay, of course, more than a million dollars for whatever would have been necessary in a practical way to exploit this name. It would either have been a case of paying a million dollars for the name and part of the assets of the brewery, or making some arrangements whereby he would pay for beer bought from the brewery. But I don't think it would have been so practical, because they just pulled that name out. At least, the fellow couldn't have just parted with that name for a million dol-

(Testimony of Cornelius G. Weber.)

lars and the buyer would go and build a brewery or go to some other company and take the name with him, and then start off anew. In other words, the practical facts would seem—that his transaction would have involved more than a million dollars of its complete purchase all around, of which a million dollars would be assignable to the good will and the balance for whatever assets he purchased wherewith to carry on the business. You couldn't just with the name alone, and no practical means of exploiting it, do anything with it to make any money.

The Court: How many barrels of beer were being made by the Rainier Brewing Company in Washington in 1935?

The Witness: The Rainier Brewing Company in [338] Washington in 1935? It was under 100,000 barrels.

The Court: Making less in 1935 than in 1913?

The Witness: Did Rainier Brewing Company in Washington?

The Court: Yes. I understood they were making 172,000 barrels in 1913.

The Witness: They made 310, that was for the State of Washington. I am sorry that I didn't make myself clear.

The Court: Now, that is what I said, they were making 172,000 barrels for the State of Washington in 1913?

The Witness: That is right.

(Testimony of Cornelius G. Weber.)

The Court: Now, you say they were making less than that for the State of Washington in 1935?

The Witness: The Rainier Brewing Company in Washington in 1935 is a different company than the old company. They have occupied and rebuilt one of the smaller breweries that the old company had.

The Court: Well, the Rainier Brewing Company was the party to the contract that was made on April 23, 1935, that is, one of the terms in the contract, the buyer was going to pay a royalty of 75 cents a barrel, and Rainier Brewing Company, organized in 1932, grew out of the Pacific Products Company, and the Rainier Brewing & Malting Company, and so forth, I understand that.

The Witness: In 1935 they were selling less.

The Court: But you did not think that that made any difference in your process of evaluation? I haven't heard you mention before that there was any different situation because of those re-organizations of the company. Isn't that correct?

The Witness: It made for conservation.

The Court: What?

The Witness: I think it made for conservatism.

The Court: I mean that didn't enter into—you didn't consider that as a factor that would discount any figure one way or the other, that the company in 1932 and '35 was a different company than the Seattle Brewing & Malting Company in 1913? You haven't said you did.

The Witness: I took that into consideration, yes. It was a different company.

(Testimony of Cornelius G. Weber.)

The Court: Well, I was asking you how many barrels of beer were made for the State of Washington in 1935.

The Witness: By the Rainier Brewing & Malting Company that is now in Washington? I have to find my figures.

The Court: Well, did you take that into consideration in arriving at this value?

The Witness: Yes, yes, I did. It was considerably less than what the old company did, and they were paying, as a matter of fact, on a much higher basis than the [340] figures that I took into account, because when they first made the arrangements of paying a minimum of $75,000 a year they were selling, as I recall, about 60,000 barrels. They were then paying a royalty equivalent to about $1.25 a barrel.

The Court: Who was paying a royalty?

The Witness: The Seattle Brewing & Malting Company now existing in Seattle was paying that royalty to the Rainier Brewing Company in San Francisco.

The Court: In what year?

The Witness: I think that was the year '34 or '35. If I can find my record here, I have the barrels sold up to the time they bought, and the barrels sold after they bought the name.

The Court: Well, maybe you will have to look that up later.

(Testimony of Cornelius G. Weber.)

Now, let me ask you another question: I believe I understood you to say a few minutes ago that a willing buyer and a willing seller on March 1, 1913, probably would want to work out a contract under which property was being sold as well as good will, but that in such contract you would think they would allocate a million dollars as the value of the good will.

The Witness: Yes.

The Court: Now, you weren't—were you, in being given this problem, told to assume that such a contract was [341] being made in 1913 where both property and good will were being sold?

The Witness: I was not told anything as to how to make this valuation.

The Court: All right. Now, did you in your own mind then feel that you would have a different value if a willing buyer and a willing seller entered into a contract to sell and purchase good will alone? You would get one value under that kind of contract. And you would get another value for good will if this willing buyer and willing seller were making a contract to sell and to buy property plus good will?

The Witness: No, I didn't. I considered it the only practical way that I could see there could be a tranfer.

The Court: You didn't consider that there would be two values for good will under those two contracts?

The Witness: I considered that.

(Testimony of Cornelius G. Weber.)

The Court: Well, I mean the answer to that is "Yes" or "No". I mean, did you or didn't you? I want to know that.

The Witness: I considered it, but——

The Court: (Interposing) No. Did you consider that the value of good will under one contract would be different than the value of good will under the other kind of contract? [342]

The Witness: I considered that it would be different, and sufficiently different.

The Court: Well, now, how would it be different?

The Witness: They would be sufficiently different that there wouldn't be a practical transfer.

The Court: You mean that there wouldn't be a willing buyer and a willing seller for good will alone?

The Witness: Well, at this figure.

The Court: At $1,000,000?

The Witness: It wouldn't be practical to just rip that out and leave that brewery stand there with the remaining business. I wouldn't consider that practical.

The Court: Well, then, your value of a million dollars from good will you consider as the value that would be paid by a willing buyer and a willing seller if, under the contract, the brewery business itself in Washington and the good will were being sold, both together?

(Testimony of Cornelius G. Weber.)

The Witness: Sold, or a lease arrangement made in whole or in part, some practical arrangement so that you could commercialize this good will.

The Court: Well, would such arrangement be rather similar to the contract that was made in 1935?

The Witness: I didn't read the details of the contract beyond the things that I thought were necessary for this evaluation. Buy the brewery? Buy part of it? [343] Those were things that I considered incidental.

The Court: All right, that is all.

If there are no further questions, you may step down.

Mr. Mackay: The witness referred to Dr. Colvin's book, and we have some photostats with reference to what he has referred to.

I should like to offer those in evidence.

Mr. Neblett: No objection, your Honor.

Mr. Mackay: I might state, your Honor, that yesterday you asked Mr. Weber to make a computation, and it was rather complicated. He was unable to do it in Court. He has now made a computation, merely illustrative of how we arrived at it, only one year. I think probably it will assist the Court and everyone else if we could have this offered in evidence and withdrawn and substitute a photostatic copy of it.

The Court: Well, I think the only way to treat with that problem would be to have the witness say

(Testimony of Cornelius G. Weber.)

that he is now ready to answer the question and read into the record what he has written.

However, there has been an offer. Are you offering those pages as one exhibit?

Mr. Mackay: Yes, Ma'am.

The Court: Those are received as Petitioner's Exhibit 31.

(The documents referred to were marked Petitioner's Exhibit 31 and received in evidence.)

[Petitioner's Exhibit No. 31 appears in Book of Exhibits.]

Redirect Examination

By Mr. Mackay:

Q. Now, Mr. Weber, yesterday you were asked by the Court to make a computation.

A. That is right.

Q. And I will ask you if during the recess last night you have made a computation explaining that matter (handing document)?

A. (Examining document) It has already been mentioned before that the adjusted net worth is $2,903,028.06.

The Court: That is of the Seattle Brewing & Malting Company?

The Witness: Yes.

The Court: The entire business?

The Witness: That is right, of the tangibles.

(Testimony of Cornelius G. Weber.)

Now, it is a matter of allocating the net assets assignable to the State of Washington, and to show a computation which would tie up these figures.

In Washington the property consisted of a brewery which is proratable to both Washington and to business outside Washington. It also includes property belonging to Washington entirely, such as trucks, and things that tend to— [345] that were used for the local business. And there was land.

It so happens that the depreciation reserve on the books is one figure of $319,230.95, which for this particular purpose has to be prorated over three classes of property, brewery property in Washington, non-brewery property in Washington and property outside of Washington. So in order to prorate that I have to take from the total of the costs in these three classes of property the land in order to arrive at the depreciable property, then deduct depreciation to get the net amounts in these three classes of property, and thereafter allocate on the basis of sales, part of which are on a barrel basis and part of which are on a dollar sale basis.

So these figures will develop as follows:

We first have depreciable property in Washington, brewery property at cost, $1,409,722.63; non-brewery property in Washington, $387,726.24; outside of Washington, $119,788.86; total, $2,017,237.73.

Deducting depreciation respectively from the above set of four figures these deductions are as follows:

(Testimony of Cornelius G. Weber.)

Brewery depreciation, $223,159.09; non-brewery, property depreciation, $61,377.06; outside of Washington, $35,694.80; total, $319,230.95.

That then leaves net property as follows:

Brewery in Washington, $1,186,563.54; non-brewery [346] in Washington, $326,349.18; outside of Washington, $185,094.06; total, $1,698,006.78.

Adding back the lands to these classes of property we have after—well, here is the amounts of land to be added; Brewery, $86,056.05; non-brewery in Washington, $87,182.98; land outside of Washington, $83,598.13; total land, $256,837.16.

After adding the land we have the following totals in Washington: Brewery, $1,272,619.59; non-brewery, $413,532.16; outside of Washington, $268,-692.19; total, $1,954,843.94.

Then we prorate the $1,272,619.59 of brewery property in Washington on the barrel sales, which were 55.5 per cent of the total.

That will give for Washington business, assignable to Washington business, $706,303.87; outside Washington, $566,315.72; making a total of $1,-272,619.59.

Then add to the $706,303.87 the brewery property allocated to sales in Washington, the total of non-brewery property in Washington in the amount of $413,532.16, making a total fixed property amount for the business assignable to Washington of $1,-119,836.03. And adding to $566,315.72 the part of the brewery allocable to outside business an amount

(Testimony of Cornelius G. Weber.)

of $268,692.19, which is property outside of Washington, we get a total of fixed property outside of Washington of [347] $835,007.91, and a grand total of fixed property of $1,954,843.94.

Then we prorate inventory on the basis of barrels sold at 55.5 per cent to the State of Washington, and we obtained the following figures: For Washington, $370,662.54; outside of Washington, $297,-197.89; a total of $667,860.43.

Now, all other current assets excluding inventory in the amount of $483,832.10, are prorated on the basis of sales in dollars. The Washington sales accounted for 64.6 per cent of the dollar sales. So we obtain the following: For Washington, $311,-909.54; outside Washington, $180,922.56; total, $482,832.10.

Prorate deferred assets on basis of dollar sales, or 64.6 per cent to Washington, and we get for Washington $9,596.23; outside of Washington, $5,-258.62; total, $13,854.84.

Then we obtain a sub-total as follows:

Washington, $1,812,004.34; outside of Washington, $1,308,386.96; totals, $3,120,391.31.

Now we have left only current liabilities, and prorating current liabilities on the basis of barrel sales and deducting them from the foregoing sub-totals, we obtain the following deductions: Washington, $126,636.60; outside of Washington, $96,726.65; total, $217,363.25.

And we obtain the final figures of net assets as-

(Testimony of Cornelius G. Weber.)

signable to business within Washington and outside of Washington [348] as follows: Total for Washington, $1,691,367.73; outside of Washington, $1,211,660.33; total combined, $2,903,028.06, which is the net worth figure from which we started.

The Court: Well, what is that figure?

The Witness: The net worth figure from which we started.

The Court: What is that figure?

The Witness: $2,903,028.06.

The Court: Well, I thought this all started by my asking you how you—oh, then you took 55.5 per cent of that last figure, is that right, and that gave you $1,750,000?

That is the way this all started yesterday afternoon.

The Witness: No; it is composed, the proration is composed of 55.5 per cent and 64.6. The grand average works out to about 58 and, I think about .4.

The Court: Well, that will do, I guess.

The Witness: I couldn't use it uniformly throughout but that is what it amounts, about what it amounts to.

The Court: We won't have you down to an exact decimal point.

The Witness: I adjusted—I didn't adjust, but for conservatism, instead of using the computed figure of $1,691,367.73, I used the round figure of $1,750,000. [349]

The Court: Now, are there any further questions? Have you any further questions?

Mr. Mackay: That is all.

Mr. Neblett: I have no questions.

The Court: Thank you, Mr. Weber, for making that explanation.

(Witness excused.)

The Court: And you have introduced all the exhibits you wanted to introduce at this time?

Mr. Mackay: Yes, your Honor.

The Court: All right. Then we will recess for lunch until two o'clock.

Do you want Mr. Weber to return, or do you want him to be excused?

Mr. Mackay: Mr. Neblett, do you want Mr. Weber any more?

Mr. Neblett: No.

The Court: Two o'clock.

(Whereupon, a recess was taken until 2:00 p.m. of the same day.) [350]

Afternoon Session, 2:00 p.m.

Mr. Mackay: Mr. Forbes, will you please take the stand?

JOHN F. FORBES,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name?

The Witness: John F. Forbes, F-o-r-b-e-s.

By Mr. Mackay:

Q. Mr. Forbes, will you please tell the Court your occupation?

A. I am the senior partner of John F. Forbes & Company, certified public accountants.

Q. And how long have you been that?

A. Ever since the firm was organized, I think in 1934.

Q. I see. And prior to that time what was your occupation?

A. Prior to that time just—you mean immediately prior to that time?

Q. Yes.

A. Immediately prior to that time I was—I had retired.

Q. Well, prior to that time—how long have you been an accountant, certified public accountant?

A. I took the CPA examination in 1905.

Q. And you practiced accounting at that time except for the short time that you were retired?

A. Yes, sir.

Q. And does your office have an office in Seattle?

A. Yes, sir.

(Testimony of John F. Forbes.)

Q. How long has it had that office, do you remember?

A. Oh, seven or eight years, I should say.

Q. And prior to that time did you make frequent visits to Seattle?

A. I have been making visits up there since 1906.

Q. Since 1906 for whom?

A. On professional business.

Q. And during that earlier period prior to the time of the organization of your firm with what firm were you connected?

A. For twenty years, exactly twenty years I was a partner in the firm of Haskens & Sells.

Q. Haskens & Sells? A. Yes, sir.

Q. That is a nationally known accounting firm, is it not? A. Yes, sir.

Q. And did that firm maintain an office in Seattle? [352] A. Yes, sir.

Q. And when you went to Seattle did you go to supervise that office?

A. I opened that office, yes, and put some of my people in it.

Q. I see. What are your educational qualifications, Mr. Forbes?

A. Qualifications for what?

Q. Well, your education, I say?

A. Well, my professional education was about this: Somewhere between 45 and 50 years ago I thought that I would like to be a lawyer and study law, and I wanted to go to work at it, so I asked a

(Testimony of John F. Forbes.)

family friend for a job in the law department of the Southern Pacific, and I was told I could have it. So when I wanted to go to work in the Southern Pacific I went to see this friend, who was Mr. Willcutt, the Secretary, and Mr. Willcutt said, well, Mr. Creed Hayman, who was the General Counsel of the company, was in Washington trying a case and wouldn't be back for two months.

But, "In our office here, why, we have something we would like to have you do. We have an English barrister here and he will supervise your work. The work consists of going through the deeds of trust of about 140 companies to determine whether the terms of the trust deeds have been [353] carried out by the companies."

So I went to work at that, and in about three weeks, inasmuch as I never had anything to do with accounts and became very much fascinated by them, I went to Mr. Willcutt and said if it was all right with him I would abandon the law and take up accounting because it fascinated me to such an extent. And I began——

The Court (Interposing): Three weeks was enough?

The Witness: Those three weeks.

And I began to study accounting. There weren't any books in this country, so I had to send to England, and during a number of years I stayed with the Accounting Department with the Southern Pacific, and in the meantime the CPA law had been

(Testimony of John F. Forbes.)

passed, and I took the CPA examination and opened in 1906, January 1906, an office for the practice of public accounting in San Francisco.

I practiced in San Francisco, and up and down, as my clients developed, up and down the Pacific Coast, and spent a great deal of time even at that time in Seattle, was perfectly familiar with the Pacific Coast conditions.

I had to take a CPA examination in Seattle because they didn't have any reciprocity agreement with California. So I have spent a good deal of time there.

In 1907 I was invited to a position on the faculty of the University of California, and for 30-odd years I [354] lectured as a member of the economics faculty of the University of California in the fields of accounts, commerce and finance. When I happened to be away and I was——

The Court: Under Dean Hatfield?

The Witness: I beg your pardon?

The Court: Under Dean Hatfield?

The Witness: Under Dean Hatfield, yes. He was the one who negotiated it in the first place, and he and I have been very close friends all these years.

In 1909 I was appointed to the State Board of Accountancy, and I think that the law was changed last week, but I think I am still a member of the State Board of Accountancy. I have been the President of it for a great many years.

In 1912 I bought an interest in the firm of Haskens & Sells. Haskens & Sells was the leading

(Testimony of John F. Forbes.)

American firm of accountants, and one of the principal international firms of accountants. And I found that accountants from New York and London (because San Francisco and the Pacific Coast was financed very largely through New York and London) were affecting my practice, and that I had to be associated with a New York and London firm. So I entered that firm and continued with them until I retired after having been a partner in that firm for exactly 20 years, 20 years to the day, in accordance with the plan. I hate to use that word, [355] but we planned it that way. But exactly in accordance with my plans I retired.

In the meantime I had practiced my profession pretty nearly everywhere north of the Equator. I have practiced it, as we opened offices in the Orient. I happened to be a CPA of the Philippine Islands because I practiced there a great deal. I practiced in Shanghai, I have practiced in Paris and London, and at the time of the rubber debacle I had to go to London, at the time of the sugar debacle I had to go to Havana, at the time of the piece goods debacle I had to go to Shanghai.

I have practiced nearly everywhere north of the Equator. Part of the time I had to stay in New York and have charge of all of the offices outside of New York. We have between forty and fifty offices outside of New York, and they were under my charge, and all of the questions which came up each minute I had to take care of.

(Testimony of John F. Forbes.)

Now, this matter of good will——

By Mr. Mackay:

Q. (Interposing): Just a moment, Mr. Forbes.

A. Yes.

Q. Do you belong to any civic organization, participate in any civic organizations around California?

A. I don't quite understand that question.

I am on the Finance Committee of Orphan Asylums, and the Finance Committee of Hospitals, and I don't know [356] just exactly what you mean.

Q. Well, that is what I mean.

A. Oh, yes! I am the Treasurer of the USO, that is, the local USO. I am the Treasurer of the California War Chest, I am the Treasurer of the Red Cross War Drive. I can't tell you how many things I am Treasurer of, but——

Q. (Interposing): Well, now, Mr. Forbes, in your professional experience you had occasion to make values, determine values of property, or stocks, including good will?

A. That is, have I had occasion to appraise it?

Q. Yes, sir.

A. That is my principal occupation, yes.

Q. Well, will you please tell the Court, and be as specific as you can, just the extent of your activities along that line, particularly during the last several years.

A. Well, ever since I have commenced practice and have prepared balance sheets of companies, and have certified to the balance sheets, I have had to

(Testimony of John F. Forbes.)

appraise the values of these balance sheets, by that I mean appraising the value of the various assets, tangible and intangible which appear upon the balance sheets.

That is a fundamental part of the work of a public accountant. And that work has continued right up to the very minute. I have just finished testifying—I testified for three months in this Pacific States Building & Loan case, [357] having appraised the value of the building and loan for the Court, not for any of the interested parties.

I should say that I had a very, very wide experience in the appraisal of——

Q. (Interposing): Well, you have testified in other cases than Pacific States, haven't you?

A. Have I what?

Q. You have testified in other cases other than the Pacific States? A. Literally——

Q. (Interposing): With respect to the fair market value of intangibles, including good will?

A. Well, I won't say that I have testified in hundreds of cases, but I have prepared literally thousands of appraisals upon good will.

Q. Yes.

A. You know, in this State for very many years it was the custom when a corporation was formed, when we had par value stock, to issue the par value, to issue the stock fully paid, and very, very often there weren't assets, tangible assets in sufficient quantity to offset the fully-paid stock. So it was the custom among all lawyers to cause a good will

(Testimony of John F. Forbes.)

to be set up. So that in the early days, when there was a great deal of mining carried on, a great many mining corporations in this State, and later when there were a great many oil corporations [358] in the State many, many of them had this element of good will, and in setting up a balance sheet, why, you had to determine whether it was good will as a value or whether it was good will as a merely nominal affair. But it was necessary always to make an investigation to determine just exactly what the situation was with reference to good will.

Q. Yes.

A. I have been engaged very often in fixing the good will of companies. For instance, some years ago Mr. Hearst wanted—was sold on the idea by some New York and California bankers it would be a good idea to borrow some money on some of his newspapers and magazines by the issuance of bonds. So they arranged with Mr. Hearst and the bankers to issue twelve millions of dollars worth of bonds on five of his Pacific Coast newspapers and five of his magazines, including the Cosmopolitan and that sort of thing. When they had a consolidated balance sheet prepared of these various elements they found they had about five millions of dollars worth of tangible assets against which it was necessary to issue twelve millions of dollars worth of bonds.

Obviously, the element of good will had to enter in there, and I was retained by the bankers to establish the good will on those Hearst newspapers. The bonds were issued upon the basis of that good will.

(Testimony of John F. Forbes.)

Subsequently, I appraised the good will of all of the [359] Hearst newspapers, and that good will was attacked about two or three years ago in the Federal Courts, and the values that I fixed were sustained by the Federal Courts in Los Angeles within the last two or three years on all of the Hearst papers.

Q. Did you testify in that case?

A. No, no, I didn't testify. I turned in a report, and the report supported the entries which had been made upon the books, and the Federal Judge down there said there was not any sense of my going down to testify, that he was satisfied.

Q. Well, now, you are familiar, of course, with the Rainier Brewing Company, are you not?

A. I am very familiar with the Rainier Brewing Company for a variety of reasons. The principal reason is that they have been a client of ours for many years. We have audited their accounts, we have prepared their tax returns, and during the last several years I have been asked to sit on their Board of Directors as a sort of technical director. I have no financial interest in the company. But I have a very great interest because they are clients of ours.

Q. Yes.

A. I may say that I have acted as a director of a great many of our clients, and it is solely since the recent rulings of the SEC that I have retired from the [360] Boards of most of them. The SEC objects to a director also acting as an auditor, not-

(Testimony of John F. Forbes.)

withstanding the fact you have no financial interest and hold merely a technical position.

Q. Well, you have made appraisals for commercial transactions, haven't you, or reorganization of corporations?

A. Oh, dozens and dozens of them, yes.

Q. Now, Mr. Forbes, I show you Petitioner's Exhibits 13, 14, 15, 16, 17, 18, 19, 24, 25 and 27, and I will ask you if you are familiar with those exhibits?

A. (Examining documents): Yes, all these that represent statements were prepared in our office.

Q. Under your supervision?

A. Yes, sir.

Q. You are entirely familiar with them?

A. I was when they were made.

Q. Yes.

A. There are a great many of them.

Q. Well, you have examined them since you came in Court today, haven't you?

A. Yes, sir.

Q. Now, have you made an investigation to determine the fair market value on March 1, 1913, of the good will inherent in the trade name Rainier in the State of Washington [361] and Territory of Alaska? A. Yes, sir.

Q. And will you please tell the Court what investigations you have made and what facts you took into consideration to make that appraisal?

The Court: May I ask at this time, Mr. Mackay,——

Mr. Mackay: Yes.

(Testimony of John F. Forbes.)

The Court: ——what you contemplate in asking the witness to testify about the fair market value of the good will inherent in the trade name Rainier? There was a contract made in 1935, which is the underlying contract which gives rise to the main issue in this proceeding, as I understand it.

Mr. Mackay: Yes.

The Court: And I think that is Exhibit 1.

Mr. Mackay: Yes.

The Court: And that contract, as I understand it (although I have not read it through) provides for the purchase by Century of certain property in Seattle, which comprised a brewing plant, is that correct?

Mr. Mackay: Yes, your Honor.

The Court: And there were features in this contract under the title of "Licensing Agreement," under which Rainier granted Century the sole exclusive right to market beer and malt beverages within the State of Washington and [362] Territory of Alaska under the trade names and grants of Rainier and Tacoma, and, of course, there were other provisions. The contract is in evidence and I am not attempting to state the provisions of that contract.

Now, I think that it ought to be made perfectly clear, and that you should make it perfectly clear, because the issue is one in which you are trying to establish fair market value, whether you are dealing with this concept of the fair market value inherent in the trade name of Rainier as an abstract matter, as property subject for sale, as property subject

(Testimony of John F. Forbes.)

for sale entirely separate from the sale of other property, or as property subject for sale in connection with other property.

The question is so broad that I find it difficult to know just exactly what the expert is asked to express his opinion of value about because the term "good will" is abstract.

Mr. Mackay: Yes.

The Court: And in the instance of the first expert which you produced you did not ask a hypothetical question, nor did you ask any question which would indicate the area within which the witness was to express an expert opinion. I think that is unsatisfactory. You asked the witness to express an opinion, and then you asked him to explain how he arrived at his opinion, and I found it rather difficult to [363] know, from listening to the testimony, just exactly the limitations on the subject that was before the witness and before the Court.

Do I make myself clear?

Mr. Mackay: Yes, your Honor. I am glad to get that observation.

What we are trying to do, if your Honor please, is to establish the fair market value on March 1, 1913, of the trade name Rainier.

The Court: Well, for what purposes?

Mr. Mackay: For the purpose of establishing a March 1, '13 value cost of what we sold in 1913 and '40.

The Court: Well, that is true, but the thing that troubles me is this: that in asking the witness a

(Testimony of John F. Forbes.)

question you do not put into the question anything that will, for purposes of this record, indicate the elements that he should be considering. Now, this witness has already stated that under certain circumstances it is a very important thing that you value good will when you are setting up a balance sheet of a corporation.

I can imagine that the valuation of good will of the business can be of various meanings.

Are we to value the good will of a business as a going concern? Are we to value the good will of a business under the liquidation of the business? Are we to value the [364] good will of a business in connection with the sale of an entire business? Are we to value the good will of a business in connection with the sale of a trade name?

Now, the last witness indicated that in his experience he did not know very many instances where a trade name had been sold, but he did indicate that he had known that the trade name "Dodge" was one sold, that name which is used by an automobile manufacturer.

Now, in the instance of the sale of a trade name to a manufacturer of the same product, or to a manufacturer who is going to duplicate the product under which the trade name formerly appeared would involve special problems.

Mr. Mackay: Yes, your Honor.

The Court: And I don't want to wait until this case is submitted to find out the nature of the term "good will" as we are using it in this case. As I

(Testimony of John F. Forbes.)

understand the issue in this case, it might be that the question of the fair market value of the good will inherent in the trade name Rainier on March 1, 1913, may not even have to be considered, that, in one sense, it is an issue which has to be considered depending upon the determination of some other issue.

Isn't that correct?

Mr. Mackay: Yes, your Honor.

The Court: Well, then, it may not be necessary to actually consider the question. But if it does become [365] necessary to consider the question then I think that I am correct in requiring now that you make it perfectly clear in asking the witness to give his opinion of fair market value, of some concept of good will in the area, of several concepts of good will.

Mr. Mackay: If your Honor please, I appreciate that observation, and if permitted, I think I will bring that out by the witness. I think he can do it by telling his conception or his process of determining the value of a trade name.

The Court: No, I have a real objection to your proceeding in that way. I think that if you produce an expert and ask him to express an opinion on value, it is your first duty, and it is absolutely essential, that you tell the expert what property is to be valued.

Now, I don't wish to hear a dissertation on the general problem of valuing good will in all kinds of businesses and under all kinds of circumstances.

(Testimony of John F. Forbes.)

I have some acquaintance with the general subject, and I know that it is a very interesting subject.

But what I want to know is: What you are asking this witness to take into consideration for the purposes of the question in this case.

Now, it is your theory that the good will inherent in the trade name Rainier as of March 1, 1913, is to be [366] valued under facts which would presuppose that a contract similar to the contract executed in 1935 was being executed in 1913?

Mr. Mackay: That may not be my purpose here, if your Honor please. If I may explain, my purpose is to develop by this witness what the fair market value in 1913 of the trade name Rainier was, and under the conditions as a going concern.

The Court: In the abstract? Do you mean for the purposes of the Rainier Brewing Company itself?

Mr. Mackay: No, for the purposes of the Rainier Brewing Company of Seattle at that time, as well as the value to a purchaser. In other words, if they were going to buy that I would want to consider the purchaser's ability to buy, and his condition there with respect to the use of that, as a usable going——

The Court (Interposing): Well, you have never yet put such elements into the question which you are giving your expert. You have been asking your experts, the first one and this witness, the most general question: What would be your opinion of

(Testimony of John F. Forbes.)

the—I have it written here—the fair market value on March 1, 1913, of good will inherent in the trade name Rainier.

Now, that is as much as you put into your question, and it is too broad. [367]

Mr. Mackay: Well, I will try to be more specific on that, Your Honor.

The Court: I may say that the Court reserves the right to analyze the reasoning of the witness even though he is an expert.

Mr. Mackay: Oh, surely, there is no doubt about that. We want you to.

The Court: And the Court cannot analyze the reasoning of the witness unless we know exactly what the witness is considering. It isn't fair to the expert and it isn't fair to the Court, unless we know exactly the elements which this witness is supposed to take into consideration.

Mr. Mackay: That is right.

The Court: Now, if you mean that the witness is to give us an opinion supposing that the Seattle Brewing & Malting Company on March 1, 1913, wanted to sell its trade name, all right.

Mr. Mackay: That would be implied in that. I intended to do that.

The Court: But that ought to be in the question. And if you want him to express an opinion of value as to what would be the fair market value in general, that is one thing. The value, it appears to me, might be different if one of these willing buyers wanted to purchase the trade name to use in a simi-

(Testimony of John F. Forbes.)

lar or identical business. He might [368] have some other reason for wanting to buy the trade name. He might want to bury it. He might want to license it. It it conceivable that the value might be different depending upon the circumstances.

At best we are dealing with an abstract proposition inherent in this kind of case. The fact is that no one actually sold or bought the Rainier name on March 1, 1913, so we are dealing with a hypothetical and theoretical proposition anyway. But I think we ought to try and overcome that handicap by making the proposition as specific as we can.

Mr. Mackay: Yes, Your Honor, I will try and make it specific.

I might state a willing buyer, we are trying to develop here, in order to say that it has a fair market value, would be one who would be fully acquainted with all the facts and have a use for it, either to use it as he——

The Court (Interposing): You might say so now to me, but my point is that you haven't said so heretofore in your question to your experts. I know what the definition of fair market value is.

By Mr. Mackay:

Q. Mr. Forbes,—Pardon me.

May I have that last question?

The Court: Well, I am going to ask you, Mr. Mackay, [369] to begin all over again.

Mr. Mackay: Yes, I intended to. I just wanted to get my thought so I wouldn't repeat that.

(Testimony of John F. Forbes.)

By Mr. Mackay:

Q. I think you have stated, Mr. Forbes, that you have examined the—are familiar with the financial records of the company, the Seattle Brewing & Malting Company? A. Yes, sir.

Q. That I have called your attention to here?

A. Yes, sir.

Q. Were you also familiar with the business conditions up in Seattle in 1913? A. Yes, sir.

Q. What factors did you take into consideration—well, I will withdraw that.

I think you have already stated that you have made an appraisal of the fair market value of the trade name Rainier as of March 1, 1913?

A. Yes.

Q. What factors did you take into consideration?

A. The general economic history of the company, the general conditions which surrounded the company as of March 1, 1913.

Q. Did you give consideration to the earnings, average earnings over a period of years prior to 1913? [370] A. I did, yes.

Q. What period did you use?

A. Well, I examined the—looked into the earnings since the organization of the company in 19—let's see—1893, wasn't it? No, 1903. No, that is it; 1893. But for the purpose of establishing the value of the goodwill I took in the five years ended June 30th, 1912.

Q. Now, in trying to determine that value, did you take into consideration the value merely in the event of a sale of the whole business or part of the

(Testimony of John F. Forbes.)

A. That is in considering the value of the goodwill?

Q. Yes.

A. I considered the value of the goodwill from the viewpoint of what I thought it would be worth assuming someone wanted to sell it; just as it had been sold in 1940.

Q. Did you also take into consideration the buyer's position?

A. Yes, of course. I assumed that there would be a willing buyer and a willing seller.

Q. And that that willing buyer could use the trade name? A. Exactly.

Q. Either for conducting a brewery business under that trade name——

A. (Interposing): For any purpose. [371]

Q. For any purpose?

A. Having to do with that goodwill.

Q. I see. Now, in arriving at that value did you take into consideration the going concern value at March 1, 1913? A. Yes, it was based——

Q. (Interposing): I beg your pardon?

A. It was based upon the theory that it was a going concern.

Q. Yes, that is what I was trying to bring out.

A. Yes, sir.

Q. And I think you stated you took into consideration the earnings for the five years immediately preceding? A. Exactly.

Q. And for what period was that, what fiscal years?

(Testimony of John F. Forbes.)

A. For the five years ended June 30th, 1912.

Q. 1912?

A. Yes, that being the last full fiscal period before March 1, 1913.

Q. Well, why wouldn't you take into consideration the earnings from June 12, 1930 to March 1,—I mean June 30, 1912 to March nineteen hundred and——

A. (Interposing): Well, it would have involved a great deal of work with a very small difference.

Q. But you are familiar, are you not, with the earnings [372] for 1913? A. Yes, sir.

Q. As well as the balance sheets?

A. Yes, sir.

Q. Did you also take into consideration the balance sheets for the year that you have talked about?

A. Yes, it was necessary to do that in order to find the value of the tangible property.

Q. Well, what analysis did you make?

A. We analyzed completely from the records the value of the tangible property as distinguished from the total value.

Q. Well, now, Mr. Forbes, the Seattle Brewing & Malting Company in 1913 had its breweries in Washington, and it also operated outside of the State of Washington.

Now, in your analysis of it did you take into consideration all the assets and income of the company?

A. Yes, yes, in order to ascertain the figure I wanted it was necessary to determine what the av-

(Testimony of John F. Forbes.)

erage assets were for a five-year period, the average tangible assets. In ascertaining them I had to ascertain what the profits were for a similar period. I allowed a return——

Q. (Interposing): Well, just a moment on that.

A. Yes, sir.

Q. How did you make an allocation between Washington—— [373]

A. (Interposing): I was about to explain that.

Q. Oh, I am sorry. I didn't understand.

A. I said in order to ascertain the total amount of the goodwill I had to use, of course, the total amount of the property, of the tangible properties and the total revenue for the period.

Q. That is inside and out Washington?

A. Yes. Now, that gave me an all-over goodwill. The proportion of that goodwill——

The Court (Interposing): Just a minute, please. What gave you an all-over goodwill?

The Witness: The determination of the return on the tangible properties and the capitalization of the assets, of a reasonable return on those assets.

The Court: Well, I think you——

The Witness (Interposing): Do I make that clear?

The Court: I think you could develop that a little more.

Your return on assets would, I suppose, mean the profit of the business?

The Witness: Yes. Now, for instance, we developed the fact that the average tangible assets

(Testimony of John F. Forbes.)

for the company amounted to $2,519,000 plus. I thought that a reasonable return on that amount, a very reasonable return would be [374] 8 per cent. A general survey of the brewery business throughout the country at that time developed the fact that breweries were earning somewhere in the neighborhood of 6, so that on the basis of 8 per cent, why, I allowed a very good—what I figured was a generous return.

The average earnings over the five-year period amounted to $383,000 a year round figures, the return on the tangible assets $201,500, leaving an excess earnings which would be attributable to the goodwill of $181,500. That would be the average annual earnings attributable to the goodwill.

Now, it seemed to me that if anyone was going to buy that goodwill——

The Court (Interposing): If anyone was going to buy the business?

The Witness: I beg your pardon?

The Court: If anyone was going to buy the business?

The Witness: Well, in this particular case, Your Honor, I think the business and the goodwill would have been identical because the business consisted almost essentially of selling Rainier beer.

The Court: Well, let me ask you this: Is this method that you are describing a standard method for arriving at a value of goodwill? [375]

The Witness: Yes, it is.

(Testimony of John F. Forbes.)

The Court: Is this the method that you use if you are making up a statement of the—well, if you were making up a balance sheet for the business don't you in some of your businesses in this area actually carry goodwill as an asset?

The Witness: Yes, some companies do, but——

The Court (Interposing): I think it may not be a practice in recent years, but I think many years ago goodwill often was carried as an asset.

The Witness: It very frequently is carried now.

The Court: Well, now, let me ask you this: Would you, for the purposes of arriving at a figure for the book value of goodwill, is this the method that you would follow, that is, of taking the average earnings of the business over a period of years and figure out how much of those earnings would be attributable to the tangible assets of the business, and allocating then the rest to goodwill and capitalize it?

The Witness: That is right, but——

The Court (Interposing): And you would apply the same method then in this problem of determining what the value of the goodwill of this business was on March 1, 1913?

The Witness: That is right. [376]

The Court: In a transaction where a willing buyer and a willing seller wanted to deal in just the trade name?

The Witness: Precisely.

The Court: Just the trade name is going to be sold?

The Witness: That is right.

(Testimony of John F. Forbes.)

The Court: Well, I would like you to explain that to me because I don't follow you on it. If I have no brewing business it is immaterial to me that the accountants, when they set up a goodwill figure on the balance sheet of the Seattle Brewing & Malting Company, arrived at a figure for goodwill by taking actual earnings and tangible assets of the Seattle Brewing & Malting Company.

The Witness: Well, of course,——

The Court (Interposing): The Seattle Brewing & Malting Company is not being sold, and I, a willing buyer, am not buying those tangible assets of the Seattle Brewing & Malting Company. All that I am buying is the name.

The Witness: That is right, but that name is a very valuable name because it——

The Court (Interposing): I want to know how you can value it. It seems to me that that method that you are following suggests more the method that would be followed in setting up a goodwill figure on the books of the Seattle Brewing & Malting Company as a going concern. It isn't a [377] method that you would follow if you were selling the name itself.

The Witness: Well, as a matter of fact, you would not set up upon the books of a company the element of goodwill unless it was—that is, an arbitrary entry would never be made. As a matter of fact, the SEC has suggested that all companies carrying goodwill upon their balance sheets, because it is an intangible, write it off.

(Testimony of John F. Forbes.)

The Court: That is right, in recent years it is not considered a good practice.

The Witness: That is right.

The Court: So that is why I asked you whether it was a practice that you were acquainted with some years back.

The Witness: No, frankly I never have known of a case where goodwill has been set up upon the books as a purely arbitrary matter. I have known a great many cases where goodwill has been set up on the books as a result of consolidation or the result of purchase.

The Court: Well, it is a figure that does appear upon balance sheets of businesses, particularly in earlier years?

The Witness: Oh, yes, yes. For instance, if some corporation in Seattle wanted to buy that goodwill and pay [378] as, in fact, the Rainier people did pay, a million dollars, or the Seattle people did pay a million dollars for it, I think that million dollars should be set up on their balance sheets because it represents the cost of an asset which they have purchased.

The Court: Well, getting back to the point, your statement of the method you were following suggested to me the method that would be followed if we were valuing goodwill of this business for purposes of determining what goodwill was as an asset of the Seattle Brewing & Malting Company.

The Witness: Exactly.

The Court: That is my point.

(Testimony of John F. Forbes.)

The Witness: That is what I am trying to——

The Court (Interposing): Well, now, the value of goodwill to the Seattle Brewing & Malting Company when it retains the name and carries on its business in exactly the same way as it has before is one thing. It seems to me, logically, the value of the goodwill inherent in the name Rainier is another thing when a buyer comes along and proposes to buy only that name and none of the other assets of the business.

Now, what are you taking into consideration? Are you considering as your transaction in 1913 the sale of the name Rainier without any other assets of the business, or [379] are you considering the sale of the name Rainier along with tangible assets of the business?

The Witness: No.

The Court: The name being an intangible asset?

The Witness: No, I am considering it from the—not with reference to its association with the company which owned it, but purely as a separate entity which might be sold without regard to the properties of the Seattle Brewing Company.

The Court: Then I don't see why a willing buyer would want to capitalize an 8-per cent reasonable return on tangible assets of $2,519,000.

The Witness: Well, I will try to explain.

The Court: Because I don't know if the business that I am going to use Rainier in is going to have tangible assets of $2,519,000.

The Witness: No, but you do know this:——

(Testimony of John F. Forbes.)

The Court (Interposing): And I am sure that the earnings produced by the Seattle Brewing & Malting Company over that five-year period before 1912 that you took into consideration were produced by management, by tangible assets, as well as by the value of that trade name Rainier Brewing Company.

The Witness: Well, now, all of those things are contemplated in it, permitting the corporation to earn on its [380] invested capital.

Now, here is a corporation with two and a half million dollars invested. Let's say that it wants to sell its goodwill. If it sold its goodwill it would probably go out of business, but let's assume that it wants to sell its goodwill and some other corporation wants to buy it. As a matter of fact, that is precisely what was done in 1940 by the other company. We assume then we want to find what that goodwill is worth.

Well, what is it worth? What is it based upon? It is based upon——

The Court (Interposing): Well, we are asking you.

The Witness: Well, I am asking myself now.

It is based upon its ability to make money. That is why they buy it. It is based purely upon its ability to make money.

The Court: The ability of the name to make money?

The Witness: Right.

The Court: Right.

The Witness: The ability of the name to make money.

(Testimony of John F. Forbes.)

Now, we assume that any brewery making any kind of beer will get a certain return upon its investment. At that time it was around 6 per cent. For purposes of this contemplation I have fixed the return at 8 per cent. The normal [381] business, with any kind of beer, throughout the country was permitted to earn 6 per cent. It might be a little bit more or it might be a little bit less, but it was in the neighborhood of 6. Therefore, to be generous I fixed a value of 8 per cent on the return on that investment.

Now, anything in excess of that normal or generous return is earnings which were incidental to this particular object, this name.

Now, the point is: What is that worth? We say that in that period the earnings of this company which had manufactured the Rainier beer were $180,000 a year in excess on a normal return, that that $180,000 was attributable altogether to the value of this trade name.

Now, we say there is an income of $180,000 which is attributable to this name, entirely attributable to it. It might be a little bit more, but certainly that amount is attributable to the name. So we want to find the value on a reasonable basis of that $180,000 worth of earnings. This is purely a financial problem. We are trying to give a value to this element which has earned $180,000 a year for the five preceding years.

We capitalize it in order to give it a value. Now, the basis of the capitalization would vary. It would

(Testimony of John F. Forbes.)

vary with the times, it would vary with the business, it would vary with the location. Money is high and money is [382] low.

For instance, 2 per cent—2½ per cent is a fine return right now, and we are delighted to get it on a government bond. A few years ago 4 per cent Liberty Bonds were selling for 85, which made an earning of 5 or 5½ per cent. All of those things have a bearing upon it.

But I think it is my judgment, and based upon my experience at that time, that a return of 12½ per cent, a capitalization of this amount, 12½ per cent, it would be worth some value through which 12½ per cent would produce $180,000 a year, and that is the value of this goodwill.

Now, as it happens——

The Court (Interposing): Well, what does that come to? What is it, then, capitalized at 12½ per cent?

The Witness: Capitalized at 12½ per cent it would be $1,450,000. But in this particular case only a portion of the goodwill was sold, and that was the portion of the business within Washington and Alaska. That business made upa little over 80 per cent.

Let's assume that 20 per cent—which I have done—one-fifth of that goodwill is attributable to the business outside of Washington.

The Court: One-fifth?

The Witness: Yes, yes. And in round figures that [383] will give you $1,150,000.

(Testimony of John F. Forbes.)

Now, that is, as I see it, a value which could be placed upon that, this earning power, eliminating the business outside of Washington and Alaska.

The Court: That would be $1,150,000?

The Witness: Yes, yes. Of course, that is based upon a return, or a capitalization on the basis of 12½ per cent. That is a very generous and a very, very fair appraisal of that goodwill.

The Court: That is generous to the seller, isn't it? It would be a good price for a seller to get? Would a willing buyer be willing to arrive at a price that would be based on a 12½ per cent capitalization?

The Witness: Yes, I think a willing buyer would be tickled to death to be able to earn 12½ per cent on his money.

The Court: Well, that is not the point. The point is whether a willing buyer would be willing to pay that price to a willing seller?

The Witness: I don't think there would be any question but that a willing buyer would want to buy that, pay that, because the similar thing was sold for a million dollars in '40. They did pay a million dollars for it.

The Court: Just because you pay a high price for it is no assurance that your earnings are going to be high? [384]

The Witness: We have shown that this name Rainier will of itself earn in excess of $180,000 a year. Now, certainly that $180,000 a year earning must have a value. That is axiomatic. Now, there

(Testimony of John F. Forbes.)

might be a lot of ways of valuing of that, that $180,000. If, for instance, you assume that capitalization of 10 per cent would be fairer—and I may say in capitalizing the Hearst newspapers—I have forgotten—sixty or seventy of them, I worked upon the theory that a capitalization of 10 per cent was desirable. That would be a lesser return than we are calculating here.

By Mr. Mackay:

Q. Now, Mr. Forbes——

The Witness: (Interposing) Well, I just want to be clear. I want her Honor to be clear on this thing because——

The Court: (Interposing) I am thinking about what a willing buyer would want to buy. I am thinking about our definition of a fair market value, a willing buyer and a willing seller. I am thinking of what a willing buyer would buy.

The Witness: You have a case absolutely in point, you have a case of a willing buyer who bought this identical thing in 1940 for a million dollars.

By Mr. Mackay: [385]

Q. Well, Mr. Forbes, in 1913 will you please tell the Court whether, in your opinion, that a willing buyer of the trade name Rainier for the State of Washington and the Territory of Alaska—whether, in your opinion, a willing buyer would have been willing to have arrived at the sales value or purchase value of that on the basis that you have described?

(Testimony of John F. Forbes.)

A. I know that if anyone wanted to buy that property they would have been delighted to have paid that price for it.

Q. And to arrive at that value would they have taken into consideration the same factors?

A. The same factors which I have taken into consideration.

Q. Yes. That is the earnings record and all of the Seattle Brewing & Malting Company——

A. (Interposing) Exactly.

Q. Well, now, you have spoken about good will there. Did I understand you to say that that was all attributable, in your view, to the trade name Rainier?

A. I would assume that it was. I think so, yes. I don't think there is any question about that.

The Court: What was that?

Will you read the question again, please?

(The question referred to was read by the Reporter.) [386]

By Mr. Mackay:

Q. Of course, in determining the fair market value of a trade name the most important thing to take into consideration is the earnings, isn't it?

A. Yes, sir.

Q. Because that either reflects an earning in excess of the tangibles or it doesn't?

A. Naturally, that is the most important thing.

(Testimony of John F. Forbes.)

If there weren't any earnings, they wouldn't want to buy the property.

Q. That is right. Then how else do you think a fair market value of a trade name could be arrived at unless you did take into consideration the earnings?

A. Well, there isn't any other way that I would undertake it. There may be other ways. The subject might be approached entirely different from an engineering point of view. I am not familiar with that.

Q. Is it your opinion that a willing buyer of the name Rainier in the State of Washington and the territory of Alaska at March 1, 1913, operating a brewery and beer business, could reasonably expect the 12½ per cent return on that name?

A. Yes, there isn't any question but that they could expect that return.

Q. So then you have taken into consideration the [387] position of a willing buyer?

A. Yes, sir.

Q. Now, just what do you mean by "fair market value"?

A. What a willing buyer would pay a willing seller.

Q. And both familiar with the facts?

A. Certainly.

Q. Well, now, you have testified, Mr. Forbes, that from the earnings—that you are familiar with the financial records of the company from 1908 to 1913, and also with its income accounts, and now

(Testimony of John F. Forbes.)

based upon those and upon your experience, what, in your opinion, was the fair market value as of March 1, 1913, of the name Rainier?

Mr. Neblett: If your Honor please, the question is objected to on the grounds, first, that it has not been shown what property Mr. Forbes is valuing and under what conditions the property is being valued.

I want to call your attention to the fact, your Honor, that the contract of April 23, 1935, in addition to the sale of the right to Seattle Brewing to manufacture this beer in the State of Washington and Territory of Alaska under the name Rainier, that contract, your Honor, contained the provisions, that is to say, "other rights in addition to the right to the trade name Rainier in the State of Washington and the Territory of Alaska."

Those rights were such as Century's obligation to [388] buy the malt from Rainier. Another one, elimination of competition by Rainier. Three, obligation on Century's part to expend for advertising. Four, obligation on Century's part to purchase the plant of Rainier for $250,000.

Obviously, your Honor, the very premise on which Mr. Forbes has based his value falls flat on its face because he has not taken into consideration what this obligation to buy malt from Rainier was worth, what the elimination of competition by Rainier was worth, what the obligation of Century to expend for advertising was worth, and what the Seattle got by virtue of the tangible assets that they paid $250,000 for was.

(Testimony of John F. Forbes.)

His value is false for another reason, a fatal reason.

Each one of those, under the terms of this contract, of these provisions that I have just mentioned, except the obligation to buy malt, is still in existence under that contract, your Honor, and to this very day Rainier must perform, or Seattle must perform under this contract.

Now, that being the case, your Honor, Mr. Forbes has not been given a question: What was the value of the good will inherent in the trade name Rainier under this contract which Mr. Forbes spoke about of April 23, 1935, together with these other rights, in addition to the right to use the trade name that I have just mentioned. [389]

If your Honor please, under our theory of the case, from this Petitioner's standpoint, this was a lease. Mr. Forbes' value assumes that a sale occurred. His value, therefore, your Honor, is subject to that fatal defect, and, therefore, is of no probative force or value in this case.

Mr. Mackay: If your Honor please——

The Court: (Interposing) Well, I will take your arguments under consideration at the proper time. I will overrule your objection to the witness expressing his opinion. I think the witness has made it clear what factors he took into consideration in arriving at his opinion and, of course, what weight can be given to the opinion depends upon the entire record that is being made here, the arguments to be made in your briefs, and so forth.

(Testimony of John F. Forbes.)

You may answer the question.

The Witness: What was the question?

By Mr. Mackay:

Q. I merely asked you what your opinion was as to the fair market value on March 1, 1935, as to the name Rainier?

A. In round figures, $1,150,000.

Q. Now, that is the value, is it, Mr. Forbes, localized in the State of Washington and the Territory of Alaska? A. Yes.

Mr. Mackay: Take the witness. [390]

Cross Examination

By Mr. Neblett:

Q. Mr. Forbes, to get it very specific, I want you to tell the Court what property you valued as of March 1, 1913, and under what conditions you valued it?

A. The property was taken at the book value as disclosed by the books and accounts.

Q. I believe you spoke about, and answered a question propounded to you by Mr. Mackay, that you valued it under the contract of April 23, 1935?

A. What?

Mr. Neblett: Read the question.

(The question referred to was read by the Reporter.)

The Witness: No.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. You don't recall making a statement like that?

A. I didn't make any statement like that.

Q. Well, the record will show.

Now, Mr. Forbes, under what conditions did you get your March 1, 1913, value of the good will inherent in the trade name Rainier?

A. What do you mean by "conditions"?

Q. I mean what strings did you attach to it?

A. You must be more specific with your questions. I [391] can't answer that kind of a question.

Q. I am just asking you then—put it this way, then, Mr. Forbes:—— A. Yes.

Q. I want to be as specific and as fair with you as I can. A. Well, I——

Q. (Interposing) You are familiar with it. You spoke several times about the contract.

A. Yes, sir.

Q. Of April 23, 1935. A. That is right.

Q. You apparently have read that contract?

A. Oh, I have read it, yes.

Q. And you spoke about the fact that this name was worth a million dollars because it actually sold for that under that contract?

A. That is right.

Q. Is that not right? A. That is right.

Q. Now, did not that contract contain an obligation by Century to buy malt from Rainier?

A. It may have, but there was not anything in that contract that would interfere with that value

(Testimony of John F. Forbes.)

as to that good will, as I read the contract. Anything else must be an [392] opinion.

Q. All right.

A. Now, as I read that contract, there was not a single thing in there that would affect the fact that, as I saw it, they paid a million dollars for that good will, that the contract, as I read it, covered five years, that these people paid for the use of the name Rainier a royalty of 75 cents a barrel up to 125,000 barrels, and beyond that they paid an increased figure. They carried that on for five years, and at the end of five years they had the option of buying the thing for a million dollars.

Now, that is exactly what they did. It is a very long contract, but that is my understanding of the contract.

Q. And if your understanding of the contract is wrong, your value would necessarily be wrong, is that right?

A. Well, "my value"? What do you mean?

Q. I mean your value of one million?

A. No. They have no relation.

Q. I am going to read you from this contract now in a second, Mr. Forbes. That contract contained a provision for the elimination of competition by Rainier in the State of Washington, did it not? A. I don't remember.

Q. You don't recall that?

A. I don't remember; no. [393]

Q. Well, wouldn't, as a practical matter, Mr. Forbes, to the buyer, Seattle—when they put up

(Testimony of John F. Forbes.)

$1,000,000 wouldn't they want to know whether Rainier would stay out of competition in the State of Washington?

A. If they bought an exclusive right to the use of the name Rainier forever, naturally that would be implied. Certainly, it would be implied.

Q. That would be an important consideration?

A. Well, heaven's sake, if they bought the name that is all there is to it. I don't see anything in your question.

Q. Well, I am going to read from the contract, paragraph 9.

> "Rainier agrees that during the period of time this agreement remains in force it will not manufacture, sell or distribute within the territory herein described directly or through or by any subsidiary company or instrumentality wholly-owned or substantially controlled by it, beer, ale, or other alcoholic malt beverages, or directly or indirectly enter into competition with Century in said territory."

A. Well, isn't that a natural thing? If Century was buying the good will, why, certainly they would want that provision included. That is part of the good will. That is what they were buying. [394]

Q. Now, Mr. Forbes, this potential buyer in Seattle who was to pay, under your opinion, this million——

A. (Interposing) $1,150,000.

(Testimony of John F. Forbes.)

Q. Yes, $1,150,000 for this name, unless he could get an agreement from Seattle Brewing & Malting to stay out of competition, what, in your opinion, would the value of the name Rainier be?

A. I don't know that I have any opinion on that, and I don't know that if I did it would have any value.

Q. I am asking you now to take the situation in Seattle that this potential buyer couldn't get an agreement from Seattle Brewing & Malting to stay out of competition. What would you advise a prospective buyer to pay for that name?

A. Well, he wouldn't be buying anything if they wouldn't stay out of business, would he?

Q. I am asking the question. You answer.

A. Well, I am asking you to see that I understand the question.

Q. You understood my question.

A. If I did understand the question, the answer is "No."

Q. In other words, the name is not worth anything at all unless the seller agrees not to compete; is that right?

A. I would assume that would be right, yes. No question about that. [395]

Q. And that is your answer?

A. Yes, exactly. They bought the exclusive right. They bought the name. They bought it forever. No question about that.

The Court: Under the 1940 contract they did.

Mr. Mackay, in his hypothetical question, wouldn't state those elements to you.

(Testimony of John F. Forbes.)

The Witness: Yes. Well, as a matter of fact, that is what they did under the 1940 contract.

The Court: You are asked to express an opinion forgetting all about the 1940 contract, as I understand it.

The Witness: Well——

The Court: (Interposing) Go on, Mr. Neblett.

Mr. Neblett: Very true, your Honor, but I am testing his value there to show him that he more or less based and fortified and confirmed his value by reference to——

The Court: Well, if you were asked to value the good will inherent in the name Rainier on March 1, 1913, between a willing buyer and a willing seller, both having in mind all the facts——

The Witness: (Interposing) Yes, I would fix this value.

The Court: And you were advised to forget you ever saw the contract executed in 1935, and you were told [396] that you should absolutely exclude from your mind any consideration of the 1935 contract, would you have to give further consideration to your figure of $1,150,000?

The Witnes: No, your Honor, I would not. There isn't anything in what you have said that would modify those figures. They are made absolutely without reference to the 1940 contract, but the fact of the matter is that the 1940 contract exists, and I know it, so there it is. But this value is made without reference to it, and it earned $180,000 a year.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. In your testimony in chief, on direct examination, Mr. Forbes, what was your purpose then, if this million dollar transaction didn't influence you, for your several references to it?

A. Simply to illustrate people did buy a good will under those particular conditions, that is all.

Q. All right, under those particular conditions, exactly. A. Yes.

Q. Now, if Century had not bought the $250,000 brewery plant under the contract of April 23, 1935, do you think they would have bought the trade name Rainier and paid a million dollars for it?

A. I am sure I couldn't pretend to tell you what I think they would have done under a given set of circumstances. [397] That is entirely out of my understanding.

Q. Do you think Seattle would have paid a million dollars for this trade name Rainier without the obligation on Century's part to expend certain amounts for advertising?

A. Well, I am sure I couldn't say that, but the fact does remain that they paid from seventy-five to ninety-eight thousand dollars a year royalty on the thing, and in order to avoid paying the royalty, why, they took advantage of the offer to buy it outright.

Q. Is it not a fact that as a practical matter, Mr. Forbes, that Mr. Sick of Seattle Brewing & Malting Company would not have wanted this trade name for any possible amount, anywhere near a

(Testimony of John F. Forbes.)

million dollars unless he could have got the other substantial considerations in that contract we have talked about?

A. I haven't any idea what was in his mind, no. I have just met the gentleman. I have no idea what his mental processes are. I don't know what he thinks, or anything about it.

Q. And you couldn't give us any answer at all on that? A. No.

Q. Well, don't you think those other considerations and rights in this contract of April 23, 1935, had some bearing on the $1,000,000 paid by Century?

A. I am sure I don't know. [398]

Q. Well, now, as an expert and as apparently——

A. (Interposing) An expert is not a mind reader.

Q. But as an expert, and as apparently a successful businessman, wouldn't you say that those other conditions in that contract had some bearing on the amounts agreed to be paid, namely, the million dollars?

A. To be perfectly frank with you, I don't remember what the details of that are. I simply can't tell. I don't remember that they were important in the thing at all. As I remember reading the contract, which was quite a while ago, they, themselves, were utterly unimportant so far as the main issue was concerned, the sale of the good will.

Q. Then, Mr. Forbes, you left yourself open to attack here when you used in your testimony a

(Testimony of John F. Forbes.)

comparison for your value, namely, the sale of a million dollars without knowing the conditions under which that million dollars was paid?

A. Oh, no, I wouldn't say that. I know generally. There may be some small provisions in that contract that might modify the amount a little bit one way or the other. I am not sure that there are. But generally they paid a million dollars for that good will, there isn't any question about that. And speaking as one of the accountants for the company, why, we have been trying to save the taxes on it, but we think that we have sold a capital asset for a million dollars, and all our contemplation is on the theory that we have done [399] that.

The Court: We will recess for a few minutes.

Mr. Neblett: Yes, your Honor.

The Court: But just before we recess, there is something you have just said. You said you are——

Read what the witness just said.

(The answer referred to was read by the Reporter.)

The Court: And so you are at the present an accountant, or associated with the accountants for the Rainier Brewing Company?

The Witness: Yes, I said that in my opening testimony.

The Court: I see. Well, I wanted to be sure about that.

The Witness: Yes, that is correct.

(Testimony of John F. Forbes.)

The Court: You are associated with them at the present time?

The Witness: Yes. And I explained that I was also on the Board of Directors of the company.

The Court: Are you at the present time?

The Witness: Yes. I explained that fully.

The Court: That is, the Rainier Brewing Company is the California—is now the California business?

The Witness: Yes. I am what is ordinarily called [400] a technical director.

The Court: I thought that you said that you had retired from business. That is what puzzled me.

The Witness: Oh, I retired—I told about half the story—I retired from business in 1941, and after a period of some three or four years I nearly went crazy and started in another firm.

The Court: What is the name of your present business, then?

The Witness: The present business is John F. Forbes & Company, which is what I testified.

The Court: And you are an accountant then for the Petitioner in this proceeding?

The Witness: Our firm is, yes.

The Court: We will take a recess, please.

(Short recess.)

The Court: Go ahead, Mr. Neblett.

Mr. Neblett: May we proceed, your Honor?

The Court: Yes.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. Mr. Forbes, what value would you put on the exclusive right to use the name Rainier beer if Seattle Brewing were to continue in business and place on the market a new brand of beer through their customers, sales organization, and same location, and through their controlled saloons in [401] the State of Washington?

The Witness: Would you repeat that question?

The Court: Would you read the question, please?

(The question referred to was read by the Reporter.)

A. The same value.

By Mr. Neblett:

Q. It wouldn't influence your——

A. (Interposing) No, no. There were plenty of other brands of beer being made up in Seattle, up in Washington.

Q. Then, Mr. Forbes, Seattle Brewing & Malting Company, under your valuation, would retain its old list of customers, its sales organization, and its control over captive saloons, is that right?

A. That is right.

Q. And this prospective buyer that you speak about, where would he get his capital from to pay this $1,150,000 to buy that name without any tangible assets?

A. Well, that is kind of a personal question. I wouldn't know where he got his capital.

(Testimony of John F. Forbes.)

Q. Well, now, where would he find it, do you think? You claim you are familiar with the conditions up there in 1913. Do you think he would find such capital in Seattle, in the State of Washington at the time? [402]

A. Well, let's assume he had it.

Q. You mean the prospective buyer?

A. Yes. Why not?

Q. All right. In other words, your prospective buyer would have to have capital enough to go in business?

A. Well, if he wanted to go into business, but, as someone suggested, someone might want to buy the name to put it out of business, that is, the value of the name.

Q. That is, just the value of the name?

A. Yes, yes, that is right.

Q. Now, Mr. Forbes, the Court made the point pretty clear, and I don't want to go over it any further, but your valuation then is based on the point of view of this seller, and you have computed your——

A. (Interposing) The point of view of——

Q. (Interposing) Just a minute. Let me get through.

And you have computed your valuation based on the Seattle Brewing & Malting Company's goodwill, based on its sales organization, its old customers, its site, and all those things that go to make up the going concern value of a business, is that right? A. That is right.

(Testimony of John F. Forbes.)

Q. Very well. Now, after Rainier had sold this——

A. (Interposing) Let me modify that answer. That is, after giving consideration to all the elements that you have [403] mentioned, why, the figure which I have named would be the goodwill value.

Q. I might ask this question before I ask the question I had in mind, Mr. Forbes: Did you or did you not disregard the imminence of prohibition in the State of Washington when you formed your value? A. No, I didn't disregard it.

Q. Well, what value did you give to that factor?

A. No value at all.

Q. Now, Mr. Forbes——

A. (Interposing) That was really after the result of very serious consideration; no value at all.

Q. Now, Mr. Forbes, after Rainier had sold under this contract the name "Rainier" and other rights for $1,000,000, in your opinion, how much goodwill did Rainier have left?

A. Well, that would involve my computing the value of the goodwill of Rainier, which I never have done.

Q. Well——

A. (Interposing) I haven't any idea what that would be.

Q. Can you give me an answer on that one?

A. No, I cannot; no. That would be a very involved and lengthy computation.

(Testimony of John F. Forbes.)

Q. What States is Rainier Brewing Company operating in at the present time? [404]

A. What?

Q. What States?

A. Well, specifically, I can't tell you. I have the information that I can get for you in two minutes.

Q. You wouldn't have any idea?

A. No, not to give you definitely the States.

Q. Incidentally, do you know whether Rainier Brewing Company has ever sold its name to any other company to do business in some other States?

A. I have no recollection of its having done so. I would say "No," but I am not sure.

Q. In other words, this transaction here is the only one of its kind that you know about?

A. So far as I know, yes, I think it is.

Q. Now, to go to the other end of this thing——

Incidentally, if your Honor please, it is very hard for me to figure out which side I am on. I tried the other side of this case up north. I am trying to be neutral.

The Witness: Well, if I might say so, I would be very unhappy if I thought you were on the other side.

Mr. Neblett: With respect to these beer companies I try to be neutral. I do think I prefer some other beer, though, sometimes to Rainier.

Mr. Mackay: Are you an expert on beer?

The Witness: Well, Mr. Goldie, he is the president [405] of it.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. Now, Mr. Forbes, seriously how much goodwill did the Seattle Brewing & Malting Company have left as of March 1, 1913, when it had disposed of its right to the name Rainier in the State of Washington and Territory of Alaska?

Mr. Mackay: Pardon me. May that question be read?

(The question referred to was read by the Reporter.)

Mr. Mackay: Now, if your Honor please, there is no evidence here at all to dispose of it in 1913. The evidence is to dispose of it in 1940. I think the question is immaterial.

Mr. Neblett: If your Honor please, we are dealing here with the hypothetical value as of March 1, 1913, after Seattle Brewing & Malting Company disposed of the name Rainier. Now, certainly Seattle Brewing & Malting Company as of March, 1913, had something left. It had Seattle Brewing & Malting Company's trade name, it had Seattle Brewing & Malting Company customers, it had Seattle Brewing & Malting Company's plant and location, it had Seattle Brewing & Malting Company's goodwill organization.

I want to know from this witness, this expert, what was the value of the goodwill retained by Seattle [406] Brewing & Malting Company after the transfer to this prospective buyer of the trade name Rainier as of March 1, 1913.

(Testimony of John F. Forbes.)

The Witness: I will have to ask you a question. When did they sell it?

The Court: No. This is following through now on this hypothetical transaction between a willing buyer and a willing seller.

The Witness: Oh. Well, would you read that? I didn't understand that it was a hypothetical question.

The Court: Well, assuming that the trade name Rainier had been sold to a willing buyer in 1913, what would the Seattle Brewing & Malting Company have left?

The Witness: What goodwill would they have left?

By Mr. Neblett:

Q. Yes. A. None so far as I know.

Q. No goodwill at all? A. No.

Q. In your opinion? A. That is right.

Q. And your value, then, of $1,150,000 based as the March 1, 1913 value of that trade name, would rob Seattle Brewing & Malting Company of all its goodwill, and Seattle Brewing & Malting Company would have no goodwill left, is that your statement?

A. That is as I see it, just as it did the same thing with Rainier.

Q. Very well.

Mr. Forbes, you testified that one of the evidences in arriving at the value of the goodwill was to determine the value of the tangible assets as shown on Exhibit 24.

(Testimony of John F. Forbes.)

Just to show you what Exhibit 24 is, I hand it to you.

A. Yes, sir.

Q. And ask you to look at it.

A. I am familiar with it.

Q. You are familiar with it? A. Yes, sir.

Q. Now, Mr. Forbes, it is observed that excluded from the tangibles is an item of investments ranging from $367,136.54 in 1907 to $791,182.67 in 1912.

A. That is right.

Q. Now, Exhibit 13 I hand you at this time and I shall ask you the following question: Exhibit 13 contains a balance sheet for the years 1907 to 1912, which contains a sub-classification of investments, which agrees with the investment figures on Exhibit 24. A. Yes, sir.

Q. Which includes bills receivable ranging in amount from $292,206.10 in 1908 to $598,353.75 in 1912. [408] A. Yes, sir.

Q. Now, what were these bills receivable?

A. I don't—frankly, I don't remember what the details are. I can get those for you without any trouble.

Q. You don't know, then, whether they were amounts due from saloon keepers?

A. I don't remember.

Q. Would you get the detail on that for us, Mr. Forbes? A. Yes, yes.

Q. I would like to have it. You don't have it in the courtroom, you mean?

A. I don't think we have it in the courtroom, no.

(Testimony of John F. Forbes.)

Q. Well, why were they not included in the tangible assets used in the brewery business? Maybe, you can answer that.

A. Well, did we deduct them? (Examining document). Well, inasmuch as they were grouped as investments we didn't consider that they had anything to do with the matter of the manufacturer's sale of beer and deducted them normally because they didn't represent investments in the plant, tangible investments in the plant.

Q. Assuming they had been advances to saloon keepers, how would you have handled it?

A. We would have omitted it just as we have omitted it. [409]

Q. You mean you would have treated it in the same fashion?

A. That is right. We wouldn't consider it a tangible asset.

Q. You would not have regarded it as an asset used in the brewing business, would you, Mr. Forbes?

A. No, we didn't consider it a tangible asset, nothing upon which to base earning power.

Q. And I believe you said you would get us a detail on that item before——

A. (Interposing) If it is available we will get it for you.

Q. Yes. Now, Mr. Forbes, just one little point here that doesn't amount to much, probably.

A. As you realize, we have had some difficulty in getting some details of this thing.

(Testimony of John F. Forbes.)

Q. Yes. I show you a letter here on your stationery headed "John F. Forbes & Company, Certified Public Accountants", and it has a protest attached to it which apparently your firm prepared.

A. (Examining document) Yes.

Q. I show to you or read to you this statement contained in the protest. The protest is dated October 15, 1942. A. Yes, sir. [410]

Q. "In Washington beer was distributed through a licensing system under which the brewer would set up a saloon, or acquire the license of a saloon, and a captive saloon would then dispense only the beer of the license-holding brewery."

A. Yes.

Q. Are you familiar with that practice in the brewery business? A. More or less, yes.

Q. And is that the usual practice in this country?

A. Well, it used to be. Right at the present time I am not familiar enough with the practices of various breweries, but when I used to go into details, and was familiar with the details, why, it was a normal practice, yes.

Q. Well, I believe our information shows that Seattle Brewing & Malting Company licensed twenty such saloons in Washington prior to 1913.

Do you know what those figures are?

A. No, no, but I would consider that part of their plan of selling.

Q. I stand corrected on that. I have just been

(Testimony of John F. Forbes.)

corrected to this extent, Mr. Forbes, that they owned twenty and licensed considerably more.

Now, would you get us, have some of your associates get us the exact detail? [411]

A. If it exists we will get it for you, yes.

Q. I think it exists because we already have some of it? A. Have you?

Q. Get us exact detail with respect to the saloons owned by Seattle Brewing & Malting Company during the period and the ones they licensed.

A. Yes, sir.

Q. If you would ask Mr. Sonnenberg (he has been very nice getting us information) to furnish us those two things.

The Witness: Mr. Sonnenberg, make a note of that.

Mr. Sonnenberg: I can't supply the information of any licensed saloons, but I may be able—I will be able to give you a list of the purported saloons owned.

Mr. Neblett: That will be splendid, Mr. Sonnenberg.

By Mr. Neblett:

Q. Mr. Forbes, the record would show, of course, but I am still of the opinion that you used the 1940 transaction as a comparison.

Now, I want to ask you if there was not an entirely different situation existing as of March 1, 1913, and as of 1920 in the brewery business generally?

The Court: Was there or was there not?

(Testimony of John F. Forbes.)

A. Well, frankly, I don't know what you mean. What do you mean by a "difference"? [412]

By Mr. Neblett:

Q. I mean——

The Witness: (Interposing) Do you know what he means?

The Court: Well, he is asking you if there was a difference, if the conditions were different in 1913 in the brewery business than they were in 1940 in the brewery business.

A. Frankly, I don't know what you mean. They made beer in approximately the same way and carried on the businesses in approximately the same way; approximately the same way. Their methods of selling may have been a little bit different. Sales ideas may have been a little bit different.

The Court: Do you mean in the State of Washington?

Mr. Neblett: Yes, State of Washington and generally.

The Witness: Yes, generally. I am talking about generally.

By Mr. Neblett:

Q. Was there any threat of prohibition in 1940, Mr. Forbes? A. Any threat of prohibition?

Q. Yes.

A. Well, if you have been reading some of the tracts of the temperance people that are sent to me you would think [413] there were. They seemed to think——

(Testimony of John F. Forbes.)

The Court: (Interposing) Oh, seriously speaking now?

The Witness: Yes, this is seriously speaking, because all the information that we get would be from reading. Seriously speaking, why, there is——

The Court: (Interposing) Then that is news to me. I would not have thought that in 1940—let's see. This is 1945. 1940 was one year before the War. We were at war in Germany. I hadn't read anything that I can recall in 1940 that would suggest that there was any threat of national prohibition in the United States in 1940, so I would like you to explain your answer.

The Witness: Why, a good many of the pamphlets which were sent to me and have been sent to me over the last five years and more have given the plans of the drives to effect a revival of prohibition.

The Court: Well, he didn't say—the question was not whether any group in the country was still advocating prohibition in 1940. His question was whether there was any threat.

Maybe you had better reframe your question. It is the word "threat" that is important in the question.

Mr. Neblett: All right, I will, if I can prefix my question with a little statement. [414]

By Mr. Neblett:

Q. Mr. Forbes, this question is directed to your knowledge as an expert, and also I am going to direct this question to your basic attitude as an

(Testimony of John F. Forbes.)

expert witness just to see whether or not you apply the reasonable factors of common sense to a situation.

Now, Mr. Forbes, standing on the ground as of March 1, 1913, was there not a suggestion, you might say, of the possibility of prohibition becoming statewide in the State of Washington?

A. A possibility, yes; but probability, no.

Q. But there was a suggestion of a possibility?

A. There was a suggestion of a possibility, of course, because they were having these local option fights all the time, but the peculiar feature about it is that as the local options would go into effect the earnings of this company would go up.

Q. Were not the earnings of this company less favorable for the fiscal year commencing June 30, 1913, than they were for the fiscal year commencing——

A. (Interposing): Yes, but in 1914 they were almost twice as much as they were in '13, you see.

The Court: What was almost twice as much?

The Witness: The earnings. Your previous witness tried to bring out the fact that there was now an incline [415] by simply calling attention to the one year.

The earnings for 1912 were four hundred forty-seven thousand-odd; for '13, $436,000, they went down that year, but for 1914, for the year ended June 30, 1914, the election being in November of that year, the earnings were $659,965, and in 1915,

(Testimony of John F. Forbes.)

for the year ended June 30, 1915, which was after the election, they were $556,000.

The Court: Well, are these the earnings for the whole company or in the State of Washington? What are those figures that you are reading?

The Witness: Well, these are for the whole company.

The Court: For the whole company?

The Witness: For the whole company.

The Court: Yes, because the sales might have gone down in the State of Washington and come up in the State of California, might not they? I should think so.

The Witness: Well, it is possible, but frankly that is not my understanding of these figures.

The Court: Well, I mean we have to be certain about that.

The Witness: Yes. Well, that is all right. I can find that out.

But you are speaking about the decline would be comparable to the other—— [416]

The Court (Interposing): No; we are talking about sales in Washington, as I understand it.

Mr. Neblett: That is right, your Honor.

By Mr. Neblett:

Q. Now, Mr. Forbes, is it not a fact that the brewery peoples realized that prohibition would be on them in a couple of years or more, and they were doing their best to get in and make a great sales effort to sell all the beer they could before they wouldn't get any more?

(Testimony of John F. Forbes.)

A. Well, I wouldn't say that it was because they wouldn't get any more. It is just a natural desire of a businessman to sell, and they sold, apparently.

Q. Isn't it the natural tendency of——

A. (Interposing): Of every businessman to sell.

Q. (Continuing): ——of some human beings, if they are totally prohibited, as some of these people thought they were going to be, to try to drink it up all at one time than try to make it last?

A. No, I don't think so.

Q. Now, Mr. Forbes, let me ask you this: Standing on the ground as of March 1, 1913, was there not a suggestion, and would not you believe as a reasonable man and an honest man that there was a pretty good chance that prohibition would come along in the State of Washington in a very short period of time? [417]

A. No, I wouldn't have thought so.

Q. You wouldn't have thought so?

A. No, I wouldn't have thought so. As a matter of fact, I spent a lot of time up there at that time. Frankly, I wouldn't have thought so.

Q. All right. I am just testing your basic attitude now. A. Yes, sir.

Q. Sift the facts through your mind.

Now, Mr. Forbes, how do you explain, then, if that was the situation, as you viewed it then, and as you evaluated it, that on November 3, 1914, Washington became dry?

A. How do I explain it?

(Testimony of John F. Forbes.)

Q. Yes.

A. Well, I explain it by the reason, the fact that the dry organizations put on a terrific drive, put on a terrible fight. There was an extraordinary fight. You have put on record here the list of publications which our people dug out and went into. Well, in examining these publications, almost up to the time of the election, why, I wouldn't assume that the election was going to win, and, of course, they only won by about 5 per cent. But the fight seemed to be carried on with a great deal of vigor on both sides, and up to the very last minute everybody thought that the wets had won. It really was not a—— [418]

Q. (Interposing): But it was a very hot contest, wasn't it?

A. Yes, of course, it was a hot contest.

Q. Was it in the papers? A. Yes, sir.

Q. Didn't the various magazines carry items about it?

A. Frankly, I didn't see the magazines. I didn't read the magazines.

Q. Would not a willing buyer up there, or buyer coming in there have been advised of these factors?

A. This was all away after March 1, 1913.

Q. I am talking about March 1, 1913.

A. Well, I am not; I am talking about the election that took place in November. March 1, 1913, there was not anything that would worry the brewery people at all, as I view it.

Q. Did you know that 87 per cent of the State was licensed territory as of March 1, 1913?

A. I don't think there is any significance in that because, as I told you, as the State became more subject to local option, or to the dry effect of local option, the earnings of the company went up within Washington.

Q. And you disregard all these factors?

A. No, no, no, I don't disregard them; but, as I state, they have no significance. [419]

Q. Very well. That is just about the same as disregarding them.

A. No, it is not the same, not at all.

Q. Now, Mr. Forbes, we have talked about March 1.

Now, standing on the ground in 1940, and as a reasonable man, would you say there was a suggestion that we were going to have prohibition pretty soon?

The Court: Where?

Mr. Neblett: In the State of Washington.

A. Well, to tell you the honest truth, I don't know what the feeling is in the State of Washington right now. I had the idea that the State ran the saloons, and sold the liquor, and that since the State did sell the liquor, why, there probably wouldn't be any dry movements, but, frankly, I don't know. I haven't been up there for quite a while.

By Mr. Neblett:

Q. Now, Mr. Forbes, don't let's fence here on immaterial matters.

(Testimony of John F. Forbes.)

In your opinion, how long do you think it would be before we have prohibition again?

A. My judgment in that won't be worth a whoop. I simply don't know. I would have no more idea than the man in the moon. As a matter of fact, when we went dry, when the nation went dry it was the greatest surprise to me in the world. [420]

Q. Do you remember? Now, I am warning you, I am testing your basic attitude.

A. You are not testing anything. You are asking me some questions.

Q. Those questions test your basic attitude.

The Court: Counsel is testing you, that is exactly what he is doing. Under the rules of our game he is testing your credibility. That is exactly what he is doing.

By Mr. Neblett:

Q. And if you make a nonsensical or ridiculous answer your credibility deteriorates.

A. Really, I am trying not to do it.

Q. I don't want you to do it, if it can be helped. I want you to stick to the facts and show us——

A. (Interposing): I am sticking to the facts. You don't have any question about that?

Q. All right.

Now, in your opinion, as a reasonable man, do you think we will have prohibition in the State of Washington in the next ten years?

A. Frankly, I simply cannot answer that question.

Q. Well, you have got an opinion on it?

(Testimony of John F. Forbes.)

A. I don't know. As a matter of fact, I haven't any opinion on it. I never thought about it, and I never give an opinion without thinking about it.

Q. Think it over right now. You are a resourceful man. [421]

A. That is absurd! I don't know a thing about what is transpiring in Seattle. My partner in Seattle has been raising a row with me about not going up there. He says, "There is so much doing, you ought to come up." Frankly, I haven't got time. I don't know what is transpiring.

Q. Mr. Forbes, you are not fair to my questions when you answer them in that way.

A. Certainly, I am! If I had any idea I would tell you.

Q. I want you to be fair to yourself.

A. I know, I understand that. You are the most solicitous gentleman I have seen for two or three days.

Q. It is sometimes right hard to make a witness tell what he knows, and I find I classify you in that category. I have to do it.

A. No, I will tell you what I know. But I won't tell you what I don't know.

Q. I didn't ask you what you knew. I asked you for your opinion as a reasonable man.

A. Well, you asked me whether I thought the State of Washington would go dry within the next ten years.

Q. Well, make it five.

(Testimony of John F. Forbes.)

A. Well, you can make it two, and I still wouldn't have any idea.

Q. No matter how smart you are in this world, Mr. Forbes, [422] if your basic attitude is sour you are not a good expert.

A. I know you are not talking about me when you are talking about smartness.

Mr. Neblett: I apologize for that statement, your Honor.

The Court: I think probably you have pursued this as far as you can profitably, if I may suggest you abandon the effort.

Mr. Neblett: Very well, your Honor.

Mr. Mackay: Yes.

The Witness: I trust his pursuit has been profitable up to this time.

Mr. Neblett: I believe that is all we want of this witness, your Honor.

Mr. Mackay: Mr. Forbes, I have one question to ask you.

Redirect Examination

By Mr. Mackay:

Q. I understood you to say on direct examination that you had determined a fair market value for the entire good will of the Seattle Brewing & Malting Company at March 1, 1913, of $1,440,000?

A. Yes, sir.

Q. And that you had attributed $290,000 of that to territory outside of Alaska and Washington?

A. Yes, approximately 20 per cent of it.

Q. And that you had assigned a value of $1,-

(Testimony of John F. Forbes.)

150,000 to the State of Washington and to the Territory of Alaska? A. That is true.

Q. Now, in view of that testimony, Mr. Forbes, how do you harmonize the answer that you gave to counsel when he asked you with respect to that assumed hypothetical buyer in 1916, or '13, I mean, if he had bought the entire good will at that time, what amount would the Seattle Brewing & Malting Company have left?

A. Well, of course, the entire good will in the State of Washington would be gone.

Q. Well, then, you misunderstood that question, did you? A. Well,——

Mr. Neblett (Interposing): He has not said so.

The Court: Well, the question, I think, referred to the Seattle Brewing & Malting Company, that is the company that had business outside of Washington, as well as inside of Washington.

The Witness: Well, of course, the question Mr. Mackay suggests to me, that the exception should have been made for the business that they had outside of the State, of course, so that what——

The Court (Interposing): You didn't think of that [424] at the time?

The Witness: No, I didn't think of that.

Mr. Mackay: That is all.

Mr. Neblett: That is all.

The Court: Will you step down?

The Witness: Are you through with me?

The Court: Yes, just step down.

(Witness excused.)

Mr. Mackay: I would like to call Mr. Humphrey.

WILLIAM F. HUMPHREY,

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your full name?

The Witness: William F. Humphrey.

Mr. Neblett: Your Honor, we don't care to retain Mr. Forbes any longer.

The Court: All right, Mr. Forbes, thank you for coming. You are excused.

By Mr. Mackay:

Q. Mr. Humphrey, will you please state where you reside?

A. I reside at the Olympic Country Club in San [425] Francisco.

Q. And you have lived here in San Francisco a few years, have you?

A. I have, all my life.

Q. I see. And what is your occupation?

A. I am President of the Tidewater Associated Oil Company, attorney-at-law also, not active.

Q. Go ahead.

A. I give my principal time to the Tidewater Associated Oil Company as President of that company.

Q. And are you also General Counsel for the Rainier Brewing Company?

(Testimony of William F. Humphrey.)

A. My office, former office, yes, sir.

Q. Yes. Now, Mr. Humphrey,—May I have Exhibit 1?

The Clerk: Yes (handing document).

Mr. Mackay: Thank you.

By Mr. Mackay:

Q. I call your attention to Exhibit 1, Mr. Humphrey, which is a photostat copy of an agreement made on the 23rd day of April, 1935, by and between Rainier Brewing Company and Century Brewing Association, and I will ask you if you participated in the negotiations leading up to the execution of that contract?

A. (Examining document): I did. [426]

Q. And will you please tell the Court where those negotiations were carried on?

A. They were carried on in Room 705, Suite 705 of the Standard Oil Building on Bush Street, in San Francisco.

Q. And they were carried on just immediately preceding the date of that contract, were they, Mr. Humphrey?

A. I believe an investigation I made recently shows it started the 23rd, I believe, of April.

Mr. Neblett: Could we have that date? He said it started the 23rd. Now, could we have the month, the date?

The Court: The 23rd of April, you mean?

The Witness: Monday, and I believe it was the 22nd of April, 1935.

Mr. Neblett: 1935. That is all I want.

(Testimony of William F. Humphrey.)

By Mr. Mackay:

Q. And do you recall, Mr. Humphrey, who attended those negotiations?

A. I can recall generally. The first day of negotiations there were present Mr. Goldie, Mr. Hemrich, Mr. Allen, I believe a Mr. Kerr—I am not sure—Mr. Chadwick and Mr. Mackie.

Q. Yes, not myself?

A. No, you were not there. Mr. Mackie, I believe, is the Secretary of the Seattle Brewing & Malting Company. [427]

Q. Which was then known as the Century?

A. Which was then known as the Century.

Q. Yes. Now, Mr. Humphrey, prior to those negotiations had an offer been made to any officer or officers of the Rainier Brewing Company by the Century?

A. I believe a letter, which I have seen——

Q. (Interposing): I call your attention to a letter dated April 11, 1935, and ask you if that refreshes your memory?

A. (Examining document): Yes, this is the copy of a letter which was received by Mr. Hemrich from Mr. Sick.

Q. Now, was—Pardon me. Go ahead.

A. Some time after the date it bears. I returned from New York, I believe, on the 11th, the 10th or 11th, so it was some time after that that it was called to my attention.

Q. And Mr. Hemrich, at that time was he President of the Rainier Brewing Company?

(Testimony of William F. Humphrey.)

A. He was President of the Rainier Brewing Company, yes, sir.

Q. And is Mr. Hemrich alive now?

A. No, he is dead.

Q. And he has been dead for three or four years, has he?

A. To my memory, I would say three or four years, yes.

Q. Yes. Have you had a search made for the original of [428] this letter, Mr. Humphrey?

A. I caused a search, yes, to be made, but I didn't make it myself personally, but the office made a search for it.

Mr. Neblett: We have no objection to the letter being a copy, if that is what you are trying to get in.

Mr. Mackay: If your Honor please, I would like to offer this in evidence. Would you like to see the original copy? I gave you a copy. Would you like to see the original, the original copy, I mean?

Mr. Neblett: Yes. I just hadn't had a chance to run through it.

Mr. Mackay: If your Honor please, I should like to offer this in evidence.

Mr. Neblett: No objection, your Honor.

The Court: Received as Exhibit 32.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 32.)

[Petitioner's Exhibit No. 32 appears in Book of Exhibits.]

(Testimony of William F. Humphrey.)

Mr. Mackay: I am reading from a copy, your Honor. I should like to read it.

> "I advised you verbally this afternoon that in the light of the objections taken to the deal as we made it in San Francisco, some of my associates were not keen to go through on that basis. I suggested an alternative way of dealing with the problem and I [429] am complying with your request that I submit it by letter so that you and your associates may consider the matter.
>
> "I think our company would be willing to make the Rainier Brewing Company this proposition: We would buy the brewery plant at Georgetown for $200,000 cash provided that your company also permit us to manufacture and sell your Rainier and Tacoma brands of beer in the State of Washington and in Alaska for all time, and to have the name 'Seattle Brewing & Malting Company.' For this privilege we would pay your company a minimum consideration of $50,000 a year, and we would be prepared to pay on a graduated basis according to barrelage whereby if we succeeded in selling say 100,000 barrels of your brands in a year——"

I will not read all of it in evidence, but I would like to read the last sentence.

> "I will be glad to hear after you discuss this with your associates whether you are interested."

(Testimony of William F. Humphrey.)

By Mr. Mackay:

Q. I will ask you, Mr. Humphrey, if you advised them, the Century people, that you were interested in this proposal of theirs?

A. I did not personally, but—— [430]

Q. (Interposing): But you knew they had been advised?

A. There was a meeting of some of the officers, of the directors. They authorized Mr. Hemrich to notify them by telegram.

Q. Yes. And as a result of your notifying them of your interest they came down and these negotiations were carried on, is that right?

A. Yes, sir. They came down after Mr. Hemrich had telegraphed, and I believe they sent a telegram in response that they would be down a certain date.

Q. Yes. Now, Mr. Humphrey, prior to this conference of the 22nd of April, 1935, and to which you referred as the date you carried on negotiations, had Century ever offered to buy Rainier or any of its assets?

A. I have no recollection of any offer being made.

Mr. Mackay: You may take the witness.

Cross-Examination

By Mr. Neblett:

Q. Mr. Humphrey, I believe you stated the first conference was held on April 22, 1935?

(Testimony of William F. Humphrey.)

A. Well, I am trusting that to memory. I think that is the date.

Q. That is not very material, but we will just have a date there. [431]

Now, who attended these conferences, to the best of your recollection?

A. Well, the conferences, as I recall, extended over two or three days, and the first day the parties I mentioned, Mr. Goldie, Mr. Hemrich, Mr. Allen of the Century Brewing Company, Mr. Kerr of the Century Brewing Company, and, I believe, Mr. Chadwick, and also Mr. Mackie.

Q. Yes.

A. Those were the people that attended the first day, and I believe the conference continued into the night and the next day too.

Q. Then these conferences, as you recollect it, were adjourned from time to time for a few days?

A. No, they were not adjourned. I believe that even on the same date, of the first day, they met again until sometime late in the evening. I was not present at that meeting. After we had discussed the terms of the agreement they were then adjourned that night to have the agreement drawn by my associate, Mr. MacMillan.

Q. Well, you were not present, you say, at this conference. Do you know whether or not the agreement was modified in your absence by any of your associates?

A. The agreement was discussed. They prepared the draft of an agreement, and the next day I was present when they discussed it again, and then there

(Testimony of William F. Humphrey.)

were certain [432] discussions about the different terms, and some terms were changed.

Q. Then, Mr. Humphrey, whatever agreements were finally settled upon you would be familiar with what was said and done, do you think?

A. Yes, I would think so. I was there. I left again for New York on the 25th, and I believe the agreement was signed as far as the Rainier Brewing was concerned before I left.

Q. And now do you recall, then, whether or not Mr. Allen made a statement at this conference somewhat of this character: "They did not agree to sell, and did not agree to sell the business."

Did you hear any, or have any understanding at any of these conferences like that?

A. I have no recollection of that occurring at any of the conferences I referred to. I don't think there was any question at that time of selling the business as a whole. They wanted the royalty, and then while they discussed the question of the royalty later on it was suggested that then they would want to, after five years have the right or some period of time, the right to acquire perpetual royalties.

Q. Do you remember a statement of this character made by, presumably made by Mr. Allen:—I believe you were supposed to ask this question. [433]

A. That I was supposed to have asked it?

Q. Yes. "Are you folks here to try to buy us again?"

The answer was: "No. We are here to make a royalty deal.

(Testimony of William F. Humphrey.)

"Is your attitude one where we could buy?

"No, we refuse to sell. We won't sell piecemeal. We will sell you the whole brewery."

Do you remember any conversation like that?

A. No, I don't see how that could take place in view of the letter, because they stated in the letter they came down for a royalty, and I wouldn't ask them if they came down to buy again.

Q. And what is your understanding of what the contract meant at the time, Mr. Humphrey, this contract of April 23, 1935, as to whether it was a license or a sale?

A. Well, my understanding is that for the first five-year term they wanted a royalty, they wanted to pay a royalty, and they agreed to pay a certain amount per barrel, I think it was 75 cents up to a certain limit, and something more than 75 cents a barrel, in excess of, I think, 125,000 barrels. I am just drawing on my memory, of course.

Q. Yes, I understand.

A. And that someone said when they negotiated that they liked the point of acquiring—I can't give the exact words, it is so long ago—but acquiring a perpetual right after [434] this trial period if they desired an option for it, or privileges.

Q. I read you from a transcript in the Seattle case, Docket No. 6625, and from the testimony of Mr. George W. Allen, which testimony presumably occurred in your presence.

A. You don't mean the whole——

(Testimony of William F. Humphrey.)

Mr. Mackay: If Your Honor please, I object.

The Witness: You don't mean the whole testimony occurred in my presence because I was not at the trial.

By Mr. Neblett:

Q. I am talking about——

A. Oh, the question.

Q. That he said——

The Court (Interposing): You mean that at the trial at Seattle that gentleman testified that at a meeting in San Francisco with Mr. Humphrey and in Mr. Humphrey's presence, Mr. Humphrey said the following:——

Mr. Neblett: That is right.

The Court: I see.

So now you are denying that that——

The Witness (Interposing): Will you read it again, please?

By Mr. Neblett:

Q. You read it, Mr. Humphrey, so there will be no mistake about it, because it might be crucial, and I want to [435] be fair.

The Court: Maybe it would be easier for you to read it than to have to read it to you.

The Witness: Yes. Thank you.

The Court: Whose testimony is this the witness is asked to read?

Mr. Neblett: Mr. George W. Allen.

The Witness: Mr. George W. Allen.

Mr. Neblett: He was one of the parties who attended the conference.

(Testimony of William F. Humphrey,)

The Court: Just read it to yourself.

The Witness: I think Mr. Allen is greatly mistaken because he also says Mr. McCarthy was then present. Mr. McCarthy was not present at all. And I believe that he refers to sometime later, when they came down there. They had many visits here trying to buy the Rainier Brewery. But at that time I have no recollection of any such conversation, and especially I am convinced now when they mention Mr. McCarthy's name, because Mr. McCarthy was not present.

By Mr. Neblett:

Q. Now, Mr. Chadwick and Mr. Mackie testified, Mr. Humphrey, to statements of a similar import?

A. Yes, sir.

Q. Do you now say that it is your recollection that these gentlemen's memory was a trifle faulty?

A. I believe that they were entirely referring to some conversation at the time we were negotiating for the sale. There were negotiations going on over a period of time to buy the Rainier Brewing Company and all its assets, and I can't tell how many visits were made. All these gentlemen here are honorable men, and I know that none of them would deliberately make a misstatement under oath, but it could not have occurred then, because he mentioned Mr. McCarthy being present.

Q. I assume having drawn contracts yourself, Mr. Humphrey, on various occasions, preliminary drafts are sometimes drawn up?

A. Yes, sir.

(Testimony of William F. Humphrey.)

Q. Do you know whether that was done in this contract?

A. Well, I would say, without charging my memory, because I can't recall particular instances, I do recall this: that the negotiations took place in my office, and we concluded generally the understanding sometime about five o'clock. And then Mr. MacMillan joined us, and they were anxious to return to Seattle, and I asked Mr. MacMillan if he would not prepare the contract. Now, I have forgotten whether we changed—I know we prepared that night a draft, but whether there were more drafts prepared, I have forgotten.

Q. What I am coming to and trying to clear up is: Did this contract that was written down here with considerable [437] formality purport to express the agreement that you people had, or did you have some extraneous agreements not incorporated in the contract?

A. Well, I don't—the contract, of course, was intended to express the agreement that we then, the understanding we had then.

Q. And if the contract did not express the understanding you didn't know anything about it, is that right? About any oral agreements modifying this contract, is that right?

A. Well, no, I don't know any oral agreements at all. Of course, several times since, on the question that—probably I should not answer because you are not asking the direct question about the purchase or subsequent conversation.

(Testimony of William F. Humphrey.)

Mr. Mackay: Well, I think you are entitled to explain your answer.

Mr. Neblett: Certainly, he can explain his answer.

You go right ahead, Mr. Humphrey.

The Witness: The only situation, the question of what that contract meant has been several times interpreted according to the expressions in the papers that I have read from Seattle by the other parties.

By Mr. Neblett:

Q. Yes.

A. Now, I say that one—I had a copy received here. I don't know. [438]

You probably better let Mr. Neblett read it first.

Mr. Mackay: I am going to give you a photostat copy (handing document).

The Witness: This copy is the paper that was called to my attention. This contains a statement by Mr. Sick, and I will read the statement, if you wish. To the effect, anyway, that they had the right and privilege to purchase or acquire the perpetual rights to the trade name of Rainier for the State of Washington and the Territory of Alaska.

That was called to my attention at that time.

Mr. Neblett: If Your Honor please, we have no objection to this article, but we do object to the statement that it was purchased.

The Court: I certainly don't understand what materiality or revelancy a newspaper article can have in interpreting a contract and I should think it would be highly improper to consider it, certainly

(Testimony of William F. Humphrey.)

without some explanation. But so far as I know, no offer has been made. I haven't anything to rule on yet.

Mr. Neblett: Well, if Your Honor please, Respondent moves that any testimony with respect to that newspaper report be stricken from the record.

Mr. Mackay: I object to that, if Your Honor please. It is proper cross-examination. And I would like, if Your Honor please, at this time to have Your Honor consider this. [439] I have gone very thoroughly into the rules of evidence, and I recognize that ordinarily newspaper articles are not received as evidence, but I think under these circumstances that they are. And I would like to give Your Honor a copy and call Your Honor's attention to certain pieces of it, as well as to certain rules of evidence which I think make it admissible.

The Court: Well, I must say I have lost track of this. And Mr. Neblett is engaged in cross-examining the witness.

Mr. Neblett: That is right.

The Court: And he has not offered any newspaper article.

Mr. Neblett: No, and I don't intend to.

Mr. Mackay: I beg your pardon, if I am out of order, I am sorry.

The Court: I am afraid you are out of order, but how did this all come up anyway?

The Witness: I think I interjected it, Your Honor.

(Testimony of William F. Humphrey.)

Mr. Mackay: He gave it as an explanation in one of his answers.

Mr. Neblett: I can start fresh again here and straighten it out in a second, Your Honor.

By Mr. Neblett: [440]

Q. Mr. Humphrey, does this agreement here dated April 23, 1935, and the subsequent agreements that were entered into constitute your understanding of what the agreement of the parties was? Or did you have some oral agreements with the offices of the Seattle Brewing & Malting Company altering in any manner this agreement?

A. I had no oral agreements. I don't know what you refer to as the subsequent agreements. That contains the understanding we had.

The Court: This is the document in evidence, isn't it? Isn't this the whole document?

Mr. Neblett: Yes, that is right, Your Honor.

By Mr.Neblett:

Q. There was a trust deed, as you recall, and several others.

A. Oh, yes. This is the only agreement here.

Q. Yes.

A. That is correct. This agreement expresses the understanding I had at the time.

Q. And your recollection is now that the testimony of Mr. Chadwick and Mr. Mackie and Mr. Allen, with respect to this agreement as shown by the statements you read from this transcript is in error, is that right?

(Testimony of William F. Humphrey.)

A. I have no recollection of the statements having been made. [441]

Mr. Neblett: That is all.

The Court: Well, I understand you to say, then, that the agreement, which is Petitioner's Exhibit 1, represents the agreement made between the parties?

The Witness: Yes, Your Honor, and, of course, the trust deed too, but you haven't got the trust deed here.

The Court: Well, the trust deed is in evidence.

The Witness: Oh! I confine my answer to this agreement, I say that that is correct.

The Court: That is correct.

Mr. Neblett: If Your Honor please, it might be a good idea at this time—well, we can take that up tomorrow.

Mr. Mackay: Are you through with your cross-examination?

Mr. Neblett: Yes, I am through.

Mr. Mackay: I have one question.

Redirect Examination

By Mr. Mackay:

Q. Mr. Humphrey, did I understand you to say on direct or cross-examination that the Century people had tried to buy you out after this agreement was executed?

A. Yes, several times. Negotiations were carried on over the period of time off and on.

(Testimony of William F. Humphrey.)

Q. Was that with respect to buying the stock too?

A. Well, it was buying the stock or the assets; sometimes [442] the assets, and other times to buy the stock of the principal owners.

Q. I see.

A. I think when the stock was something like 90 per cent of the stock.

Mr. Mackay: I see. That is all.

Mr. Neblett: That is all.

Mr. Mackay: Do you have a question, Your Honor?

The Court: No.

Now, are you going to refer to this newspaper article?

Mr. Mackay: That is all, Mr. Humphrey, if you want to leave.

The Court: You are excused.

(Witness excused.)

The Court: Well, that is something you can take up without this witness.

Mr. Mackay: Yes, Your Honor.

The Court: Then it can be taken up tomorrow?

Mr. Mackay: That is true.

Mr. Neblett: Yes.

The Court: All right. I thought we would recess at this time until tomorrow morning.

Mr. Neblett: That is all right.

The Court: And then how many more witnesses have [443] you?

Mr. Mackay: Well, I have, if Your Honor please, I think it is three short witnesses. I think one won't take more than fifteen minutes. I don't think either one of them should take more than that.

The Court: And then are you going to call on your witnesses?

Mr. Neblett: Yes, Respondent has one witness, Your Honor.

The Court: All right.

Now we will recess until ten o'clock tomorrow morning.

(Whereupon, at 6:30 p.m., a recess was taken until 10:00 a.m., Saturday, July 21, 1945.) [444]

Proceedings July 21, 1945

Mr. Mackay: I would like to call Mr. Samet.

The Court: Mr. Samet has already been sworn. You have already been sworn?

Mr. Samet: Yes, Your Honor.

RUDOLPH SAMET

recalled as a witness for and on behalf of the Petitioner having been previously duly sworn was further examined and testified as follows:

Direct Examination

By Mr. Mackay:

Q. Mr. Samet I have in my hand here a copy of Articles of Incorporation of Rainier Brewing

(Testimony of Rudolph Samet.)

Company. The corporation was organized under the laws of the State of Washington in 1903.

Mr. Neblett I think you have already got a copy of it. I gave it to you the other day.

Mr. Neblett: The Articles of Incorporation?

Mr. Mackay: Yes.

Mr. Neblett: Well I have no objection to them, Mr. Mackay. I don't think we have a copy, though.

Mr. Mackay: We will see that you get a copy.

Mr. Neblett: All right.

Mr. Mackay: I would like to offer this in evidence, [449] if Your Honor please.

The Court: Any objection?

Mr. Neblett: No objection.

The Court: Received as Exhibit 33.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 33.)

[Petitioner's Exhibit No. 33 appears in Book of Exhibits.]

By Mr. Mackay:

Q. Mr. Samet, do you know why the Rainier Brewing Company was organized at that time?

A. It was a year before my time.

Q. I know, but do you know why it was organized? A. Yes, sir.

Q. Why?

A. To keep the name "Rainier" safe so that no other company could start under that name.

Q. I see. It just had a small capitalization?

A. Yes, at that time.

(Testimony of Rudolph Samet.)

Q. Yes. Now, Mr. Samet, do you recall—I think you testified before that you joined the Seattle Brewing & Malting Company in about 1904?

A. Yes.

Q. Do you recall about what the capacity in barrels of beer that was being manufactured at that time?

A. About; not quite 70,000 per annum.

Q. Yes. And do you remember about what the barrels [450] were in 1913?

A. In 1913? Oh, I think about 350,000 anyhow.

Q. I think the record shows around 310,000.

A. Oh, 310,000.

Q. Now, Mr. Samet, do you know whether the Seattle Brewing & Malting Company issued stock dividends prior to 1913? A. In 1913, yes.

Q. I say prior to 1913?

A. Oh, yes, they did.

Q. Will you please tell——

A. (Interposing) Now, I tell you, I don't know. I can't remember the year any more, but it was capitalized, the Seattle Brewing & Malting Company, for $1,000,000, and they paid 12 per cent dividend. Then we made out of the one million, two million. I can't remember the date, and it still was paid, they paid 12 per cent dividend on the two million. And then they made three million out of the two million, and still we paid 12 per cent on the three million. So, in other words, the original shareholder, he got 36 per cent dividend on his money.

(Testimony of Rudolph Samet.)

Q. Yes. Now, Mr. Samet, the record shows that during the fiscal year ending June 30, 1913, the Seattle Brewing & Malting Company spent $224,000 for plant and equipment, and for the fiscal year ending June 30, 1940, it spent $168,000 [451] for plant and equipment.

Now, can you briefly tell the Court what expansion took place in your plant at that time?

A. Now, first of all we—you know, to increase our capacity we needed additional cellars. We built not wooden cellars, or some of them were of wood—we built concrete, additional cellars, and then we bought gas lined tanks. You know, the gas lined tank was practically new at that time. It replaced the wooden tanks. We got a trainload of such gas lined tanks from the East to install in those new cellars.

Q. Now, when you speak of a "trainload," how many gas lined tanks would be on one car?

A. You know, it took one flat car to put a tank on.

Q. I see. And do recall approximately how much that increased your capacity?

A. Oh, it——

Q. I withdraw that question.

A. Do you mean the additional building?

Q. Yes.

A. Oh, at least for 150,000 more barrels, you know, because in 1915 when we closed up on the 31st day of December we sold 508,000 barrels of beer.

(Testimony of Rudolph Samet.)

Q. Now, I think you also testified that in 1915 you became President of the Rainier Brewing Company in San [452] Francisco?

A. Became Vice President and General Manager when I came down here. I had that position up there sometime before.

Q. And can you state whether or not subsequent to 1915 the Rainier Brewing Company, which was then operating in San Francisco, shipped beer into Washington? A. Yes, they did.

Q. What percentage of alcohol? A. 2.75.

Q. And that was permitted at that time?

Permitted legally, but only to private consumers.

Q. Yes.

A. We couldn't deliver any for selling.

Q. That is the alcohol content of the beer?

A. That was the percentage for up there.

Q. Yes. Did you have an opinion in 1913, Mr. Samet, regarding the going concern value of the Seattle Brewing & Malting Company?

A. Regarding what, please?

Q. The going concern value of the Seattle Brewing & Malting Company?

A. You mean what it——

Q. (Interposing) What it was worth?

A. What it was worth if somebody wanted to buy it?

Q. Yes, the whole thing? [453]

Mr. Neblett: That is all right. It is a preliminary question.

(Testimony of Rudolph Samet.)

By Mr. Mackay:

Q. I asked you if you had an opinion as to the value as of March 1, 1913, of all of the assets of the Seattle Brewing and Malting Company?

A. Oh, yes, I have.

Q. What was that opinion?

Mr. Neblett: Just a minute, Mr. Mackay. If your Honor please, the question is objected to on the ground that is not the issue in this case. The issue in this case is the March 1, 1913, value of the sole and exclusive right to manufacture and market beer and other alcoholic beverages under the trade name Rainier in the State of Washington and the Territory of Alaska.

The Court: It is a preliminary question, isn't it?

Mr. Mackay: Well, if your Honor please, to be very frank, there seemed to be a little confusion the other day about this. I was merely going to ask this witness what his opinion was at that time of the value of the whole business. I was not going into anything other than that, because after that, with the other testimony we have, we have worked out the value of the good will. I think it is quite proper and would certainly help to clear up the situation, as I see it. [454]

The Court: Objection overruled.

You may answer the question.

A. Oh, I would think about 4½ million.

By Mr. Mackay:

Q. Four and a half million dollars?

A. Yes, sir.

(Testimony of Rudolph Samet.)

Q. Now, did the Seattle Brewing & Malting Company prior to 1913 sell anything other than beer or alcoholic products? A. No.

The Court: Just let me ask the witness this question:——

Mr. Mackay: Yes.

The Court: I think that, according to the balance sheets, $4,500,000 was the book value of the whole concern, wasn't it?

Mr. Mackay: I think, if your Honor please, that there was a capitalization of about three million.

Where is that balance sheet?

The Court: Let me see. We have balance sheets.

Mr. Mackay: That is No. 1, I think.

The Court: I think we ought to see what the witness' opinion is, whether it is book value or——

The Court: (Interposing) It is 16.

Mr. Mackay: 16. I have it, your Honor. [455]

The Court: Well, now, Exhibit 13—is it?—entitled "Seattle Brewing & Malting Company balance sheets for periods ending in various years, including 1911 and 1912."

Now, we have a total value of the entire business. As I understand it, this is a balance sheet for the business of the company as it was conducted in California and in Washington.

Isn't that correct?

Mr. Mackay: Yes, your Honor.

The Court: Well, the book value of the entire business, total assets, was $4,414,000; earned surplus was $2,042,000; capital was $2,000,000; total

(Testimony of Rudolph Samet.)

capital surplus was $4,042,000; and then there were some other items that brought up the total value of the business to $4,414,000.

I suppose in the stipulation of facts it is shown what the assets of the entire business comprised, but you may not have covered that. With all of the testimony that has been presented, I am not sure that the testimony has made it entirely clear, though, how far the business of Seattle Brewing & Malting Company extended in 1913.

The reason I can't be sure of that is because some of the facts have been stipulated, and a good deal is covered by the 33 exhibits of the Petitioner.

Mr. Samet, in 1913 you were associated with the Seattle branch of the business, is that correct?

The Witness: Over the whole, with the whole thing.

The Court: No; in 1913 were you still in Seattle?

The Witness: Yes, your Honor. I went away on the—about in November of 1915 I came down here.

The Court: What was your capacity in the corporation in 1913?

The Witness: I was General Manager at that time.

The Court: General Manager of what?

The Witness: Of the Seattle Brewing & Malting Company.

The Court: Of the entire business?

The Witness: Yes, your Honor.

The Court: Was the main office in Seattle?

(Testimony of Rudolph Samet.)

The Witness: Yes, your Honor.

The Court: And where did the Seattle Brewing & Malting Company in 1913 sell its products?

The Witness: We sold—the bulk of the business was done in the State of Washington, I know that, but we sold here in California quite a great deal. We sold it to John Rapp & Son. He was then our agent. Then we sold beer in Los Angeles. We went as far, nearly, as Billings, Montana.

The Court: Did you sell beer in Oregon?

The Witness: Yes, your Honor. [457]

The Court: Oregon, Washington, California?

The Witness: Montana. Billings, that is as far as we went on account of the freight trains. If we go further they were against us.

The Court: Nevada?

The Witness: Yes.

The Court: Utah?

The Witness: No, not very much Utah, no. We sold some, but hardly worthwhile.

The Court: Idaho?

The Witness: Yes, we sold in Idaho.

The Court: How far south did you go? Into Arizona, New Mexico?

The Witness: No, as far as Los Angeles, San Diego; Los Angeles and San Diego in California.

The Court: I see. And in those States you sold through agents, is that right?

The Witness: Yes, we had agencies in some of them. Now, take in San Francisco, we had John Rapp & Son. He had his own bottling works at

(Testimony of Rudolph Samet.)

that time, and he bottled our products here under "Rainier." In other places we had a paid man, you know, an agent under salary.

The Court: Now, when you say that in your opinion the going concern value of the entire business of Seattle Brewing & Malting Company in 1913 was $4,500,000, is that [458] just a round figure?

The Witness: That is just—you know, I think, that if anybody would have come and said "I want to buy the plant," which nobody came, but that is about the least they would have taken. I don't think they would have taken that.

The Court: That is a little more than the book value of the business?

The Witness: Yes, but not much more.

The Court: Well, according to that exhibit it is almost $500,000 more.

The Witness: Well, in my estimation, you know, it would have been worth four and a half million as the seller.

The Court: It is pretty far back. Well, I just wanted to see what the difference was between your opinion and the value of the business as shown in the balance sheet.

That is all.

By Mr. Mackay:

Q. Now, Mr. Samet, when you speak about $4,500,000, do you mean just the plant——

A. (Interposing) And the name.

Q. Yes, and not the investments, not the stocks and bonds that you may have had?

(Testimony of Rudolph Samet.)

The Court: Well, if you are going to examine the witness in that way, then I think that I will have to rule [459] that you will have to go through the whole procedure. Now, objection was made and I overruled the objection. This witness was a general manager of the business, but he was not president of the corporation.

Who was the president in 19——

The Witness: (Interposing) At that time Louie Hemrich.

The Court: Well, the point is if you are going to place very much reliance on the opinion of this witness, then you will have to qualify him and do the whole job.

Mr. Mackay: Well, if your Honor please, I will withdraw all the testimony in respect to value. I realize he was just a general manager and not a president.

The Court: Well, the point is that your last questions now, you want him to break down the value and to say what he includes in his value, what he eliminates.

Let me see that balance sheet. I have it here.

Your last question is whether that value included or excluded investments. Well, you haven't shown that the witness knows what the investments were in 1913, or what they consisted of, or what the fair market value of the investments was. The investments are included in the balance sheet as an asset, and the investments are rather large. So that would

(Testimony of Rudolph Samet.)

trouble me as I read the record. That would seem to be a question that I would want to have [460] developed a little further.

Mr. Neblett: If your Honor please, could I state at this point that this Exhibit 13 shows good will as of 1912 as $338,671.31.

The Court: Well, we weren't talking about good will at this point. We were talking about investments, but then that is a point, I suppose.

Mr. Neblett: Yes, I just wanted to make that point.

The Court: All right. Will you go ahead?

By Mr. Mackay:

Q. Well, Mr. Samet, did you have an opinion in 1913 as to the value of the trade name Rainier?

A. Yes.

Q. What was your opinion?

A. That is, you know, before my coming to Seattle there was not so much Rainier sold, but after 1913 it has grown tremendously, the sales increased and increased and increased, and especially the bottled beer sales.

Now, you know when I came to Seattle bottled beer——

The Court: (Interposing) Well, I think the witness is going beyond the scope of the question.

Did you say that you did have an opinion?

The Witness: Yes, I did.

The Court: Well, that is all. [461]

The Witness: I did. The——

The Court: (Interposing) The answer is "Yes". Now what?

(Testimony of Rudolph Samet.)

By Mr. Mackay:

Q. What was your opinion on the value of the trade name Rainier?

Mr. Neblett: If Your Honor please——

A. My opinion was——

The Court: (Interposing) Just a minute.

Are you making an objection?

Mr. Neblett: Yes. The question is objected to on the ground that the witness has not been shown to be familiar with the conditions existing as of March 1, 1913.

The Court: Objection sustained.

By Mr. Mackay:

Q. Well, now, Mr. Samet, you were the general manager of that business in carrying on its operations, were you not?

A. Yes, sir, of the whole thing, and all the operations and everything.

Q. Yes. Now, what would you think would be the fair market value of the brewery and the trade name as a going business?

Mr. Neblett: If your Honor please, the question is objected to. It has not been shown that this witness knows [462] what the conditions were as of March 1, 1913. Secondly, the witness has not been shown to be an expert in the sense of valuing a trade name, and, thirdly, there is no evidence in this record that this witness is qualified by that special knowledge other than being just general manager to appraise the value of the trade name and good will as of March 1, 1913.

(Testimony of Rudolph Samet.)

The Court: Mr. Mackay, I realize that Mr. Samet was the general manager, and from what he has said I think it is apparent that he was very familiar with the conduct of the business, but the question of how to value a business, how to value good will, how to value a trade name is a very special thing, and you certainly haven't asked the foundation questions of this witness that would indicate that he had a fair and objective opinion on the point of value. Now, since that is such an important question in this case, and we have had two expert witnesses testify about that, I feel that that objection should be sustained for the present at any rate.

Mr. Mackay: Well, I think your Honor is right. I think that the witness has not been qualified.

You may take the witness.

Mr. Neblett: Mr. Samet, just one or two questions.

Cross Examination

By Mr. Neblett:

Q. In 1913 wasn't Seattle Brewing & Malting Company shipping beer to the Orient? [463]

A. Yes, we did.

Q. Tell the Court briefly about your export trade as of March 1, 1913.

A. I personally went to the Orient and opened up agencies, changed agencies of the existing ones, and, take, we sold—what do you want to know? I don't remember the figures, how much we sold, but we sold quite a great deal.

(Testimony of Rudolph Samet.)

Take in Honolulu, in Shanghai, in Manila, in Singapore, and even in Calcutta, but all—you know, as I say, it was all Rainier bottled beer.

Q. Now, have you covered generally all the export trade that Seattle Brewing & Malting Company did as of March 1, 1913, that you now can think of?

A. Yes. Oh, there is some, but it didn't amount —to South America, but not much.

Q. To South America, you say?

A. Yes, sir.

Q. You did then have some export trade to South America? A. Yes, sir.

Q. As of what date?

A. Oh, before 1913. We had some in 1911, and '12. We had some export trade.

Q. Yes. How about Mexico?

A. How much? [464]

Q. How about Mexico?

A. Mexico? No.

Q. No export trade to Mexico?

A. No, no.

Q. Mr. Samet, I believe you spoke about the capacity of the Seattle Brewing & Malting Company as of December 31, 1913, is that right?

A. The capacity?

Q. Yes.

A. We were assured of capacity as we kept on growing, and that is where we added to the——

Q. (Interposing) What was your capacity as of March 1, 1913, of the Seattle Brewing & Malting Company?

(Testimony of Rudolph Samet.)

A. Let me think. That is over thirty years ago. Let me think. We could have turned out there about 350—from 300 to 350,000 barrels.

Q. In how long a period of time?

A. Per annum.

Q. Per annum? A. Yes, sir.

Q. Now, you say that owing to certain monies spent in 1913 this capacity was increased about 150 barrels, is that right? A. 150,000 barrels.

Q. I mean 150,000 barrels. I stand corrected, Mr. Samet. [465]

And now will you tell us what the books show with respect to the tangible assets of Seattle Brewing & Malting Company as of March 1, 1913?

A. You mean the amount of tangible——

Q. (Interposing) Yes, yes.

A. Well, how could I remember that?

Q. Well, just give us some estimate there of what it—the records show here. You have heard it half a dozen or more times.

A. I don't want to—really, I can't remember it.

Q. Well, don't you recall about three and a half, four million dollars? A. About what?

Q. About three and a half or four million dollars?

A. Oh, you mean the assets of the company you want?

Q. Yes. A. Yes, about that.

Q. And do you recall now how much money was spent in these betterments as of March 1, 1913?

A. For the improvements?

(Testimony of Rudolph Samet.)

Q. Yes.

A. Oh, about, I think, in all, a little over $300,000. I think so.

Q. So by spending approximately $300,000 on an investment of approximately three and a half, four million dollars [466] you increased the capacity approximately 50 per cent, is that right?

A. Well, it isn't 50 per cent. I will tell you when you increase your capacity you don't in a brewery—you know, it is the adding of cellars, machinery, your machinery which you have in the brewery, they are able to turn out more than you turn out. You buy them big enough. Now, take a kettle—we didn't need a new kettle or anything, just storage capacity and vats to put the beer in, and that don't amount to much. The rest, you get along with the machines you have on hand, you know. You buy a kettle holding—you can make in one brew 500 barrels, and, maybe, you use only 350 barrels at one brew, but you buy your equipment large enough in the beginning so that you don't need to replace or add new ones when you need it.

Q. I see. Mr. Samet, my only point was that on this investment of three and a half or four million dollars you spent—made improvements of approximately $300,000, and by doing so you increased your capacity 50 per cent.

That is just about right, isn't it?

A. Yes, you do.

(Testimony of Rudolph Samet.)

Mr. Neblett: That is all.

The Witness: Yes, you do.

Mr. Neblett: That is all, your Honor.

Mr. Mackay: That is all. [467]

The Court: You are excused.

The Witness: Thank you.

(Witness excused.)

Mr. Mackay: Call Mr. Goldie.

JOSEPH GOLDIE,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name?

The Witness: Joseph Goldie, G-o-l-d-i-e.

By Mr. Mackay:

Q. Mr. Goldie, you are now President of the Rainier Brewing Company? A. Yes, sir.

Q. And you have been President for how long?

A. Since, I believe, 1938.

Q. Yes. Prior to that time were you a resident of Seattle?

A. Quite a bit before that time.

Q. When were you a resident of Seattle?

A. I left there in 1915.

Q. You left there in 1915? A. Yes, sir.

Q. And prior to 1915 you had been a resident of Seattle for a number of years, had you?

(Testimony of Joseph Goldie.)

A. Yes, sir, since 1900.

Q. And what had been your business up there?

A. I was at one time in the wholesale liquor business up there.

Q. Were you in the wholesale liquor business in 1913? A. Yes, sir.

Q. Will you please tell the Court whether or not you made any investments in the liquor business in 1913 in Seattle, or Washington?

A. Yes, sir. In the Fall of 1912 our company, known as the Goldie Klenert Company, made an extensive investment in the City of Everett, which is about 30 miles north of Seattle. We opened up what was known as the Everett Liquor Company.

In the Spring of '13 I helped finance a liquor establishment known as the Mission Liquor Company for a brother of mine, Charles E. Goldie in the City of Seattle.

Those are about the only two that I recall that we invested in in '12 and '13.

Q. Well, were you familiar with the activities of the people who wanted it dry up in Seattle in 1913?

A. Well, the first experience that I have had, that I recall, where there was any activity on it, among the drys, [469] was the opening up of 1914. We had a man in the City of Seattle by the name of Dr. Matthews, a Presbyterian Minister, who started the fight for prohibition.

As I was standing in front of my place of business (I don't recall just what month, but I know it was in the Spring of '14) we saw a parade headed

(Testimony of Joseph Goldie.)

down the street, headed by Mr. Matthews, mostly women folks marching with white flags in behalf of making the State dry.

That was the first activity that I saw in the City of Seattle pertaining to making the State dry.

Q. Now, Mr. Goldie, you were familiar, were you, with the Tacoma Brewing Company?

A. At that time or recently?

Q. Subsequently? A. How?

Q. Subsequently? A. Yes.

Q. I think the Pacific Products Company purchased it, or, I mean the Tacoma Brewing Company, didn't it?

A. Well, we did that, we purchased the Rainier Brewing Company, or the Seattle Brewing & Malting Company in 1925 during prohibition here in San Francisco, a group of us, and thereafter we purchased the Tacoma Brewing Company in 1927.

Q. Yes. And did it put out a beer under the trade name Tacoma? [470] A. Yes, sir.

Q. Will you please tell the Court what the Pacific Products Company—I will withdraw that.

Did the Pacific Products Company thereafter sell beer under the name Tacoma for a while?

A. We sold it from the time we bought it. We made near beer, and when the repeal came for real beer we sold Tacoma beer, as well as Rainier, under the name of Tacoma.

Q. Well, did you sell very much Tacoma?

A. Not very much. We sold more near beer than we sold the real beer.

(Testimony of Joseph Goldie.)

Q. Had the Pacific Products Company prior to the repeal of prohibition sold near beer?

A. That was all we could sell, sir.

Q. And the Seattle Brewing & Malting Company also sold near beer after prohibition?

A. Of San Francisco you are speaking of?

Q. Yes, sir.

A. Yes, sir. We shipped our near beer up to Seattle in those days.

Q. Do you remember the content of alcohol in that near beer?

A. One-half of 1 per cent.

Q. Now, Mr. Goldie, do you remember when the San Francisco, I mean when Rainier built the San Francisco [471] Brewery? A. When what?

Q. When Rainier built the San Francisco Brewery?

A. In 1915 the Seattle Brewing & Malting Company came to San Francisco to build its brewery, its new brewery after the State had voted dry in the State of Washington.

Mr. Mackay: You may take the witness.

Cross Examination

By Mr. Neblett:

Q. I believe you stated you financed your brother in the beer business, or the whiskey business?

A. Oh, it was a cafe and liquor business; no beer business.

Q. No beer business? A. Yes.

(Testimony of Joseph Goldie.)

Q. Where was that?

A. Located on Second Avenue, called the Mission.

Q. Seattle, Washington? A. Yes, sir.

Q. When was that? A. In 1913.

Q. When did you commence to finance him up there?

A. Well, I had financed him in prior years.

Q. Where? A. In other places in Seattle.

Q. Other places? A. Yes.

Q. How much prior?

A. Oh, I think two or three years prior to that.

Q. So you didn't commence to finance him in 1913 as your testimony in chief indicated, but had been financing your brother previously to that time?

A. Yes, sir.

Q. Is that right?

A. I had financed him previously, yes.

Q. And how much money did you let him have?

A. We put up $30,000 in cash for that particular place. He only had a half interest in it; he had another man in with him, but I can't recall his name.

Q. How much did you put up of the $30,000?

A. I put up $15,000 of it.

Q. Now, this other business that you financed, where was that?

A. Everett, Washington.

Q. And when did you commence at that business?

A. When? I am sure it was in the Fall of '12, 1912.

(Testimony of Joseph Goldie.)

Q. Are you sure or not now. Can't you give us some better judgment on that?

A. I can't. It is a good many years ago, and I tried to find some data on that, but I couldn't. [473]

Q. It might have been 1910, is that right?

A. No, no, I am sure of that, because the business was not successful, and I knew that we did not get our investment out of it when prohibition finally closed us. We lost considerable money on it.

Q. On that transaction? A. Yes, sir.

Q. Yes. Well, how about the Seattle transaction? Did your brother——

A. (Interposing) No, that didn't prove a success either. We lost money on both of them.

Q. You lost money on both of them?

A. Yes.

Q. How much money?

A. I couldn't answer that.

Q. Everything you put in?

A. Oh, no! Oh, no! We got back part of it.

Q. What is your connection with Rainier Brewing Company at the present time?

A. I am the President.

Q. Of the Petitioner in this case?

A. How?

Q. The Petitioner in this case, you are the President of——

A. (Interposing) I am the President of the Rainier [474] Brewing Company, yes, sir, of California.

(Testimony of Joseph Goldie.)

Q. How much stock do you own in the company?

A. I own 22 per cent of the company, 65,000 shares, that is, my family and myself.

Q. How long have you owned that interest?

A. Practically from the—well, I didn't own quite as much when we bought it in 1925. I had about 20 per cent. But I bought about 2 per cent of it during the intervals from the time we bought it in 1925.

Q. Mr. Goldie, you said "a group of us", I believe was the way you expressed it, "purchased Rainier in 1925"? A. Yes, sir.

Q. Is that right? A. Correct, sir.

Q. Did you purchase assets of Rainier and/or Seattle Brewing & Malting Company, or did they purchase stock of the Seattle Brewing & Malting Company?

A. We bought the entire stock. Well, we bought first the controlling interest and then picked up the minority stock as we went along. We, up to this time, never were able to get at a hundred per cent. About 8 per cent of the old stockholders are still in existence and still have stock in the company.

Q. Yes. How much did you pay for it?

A. We paid in the neighborhood of $1,050,000, is what [475] it cost us in 1925. That is for Rainier alone.

Q. Now, you say "in the neighborhood."

Can't you estimate that a little bit closer?

(Testimony of Joseph Goldie.)

A. Well, it may have been ten thousand more or ten thousand less.

Q. That was approximately it?

A. Yes, sir.

Q. How was it paid for? What was the form of consideration that passed? A. Cash.

Q. Cash? A. Yes, sir.

Q. And what was that date?

A. April, during the month of April, 1925.

Q. April, 1925? A. Yes, sir.

Q. How much stock did you purchase, Mr. Goldie, for the amounts you stated?

A. You mean the group or myself personally?

Q. The group.

A. The group? The first purchase we made was a controlling interest in the City of Seattle which amounted to 12,500 shares. We bought that at $59 a share.

The Court: Shares in what corporation?

The Witness: Shares of the Seattle Brewing & Malting [476] Company, Seattle, Washington. We paid $59 a share for 12,500 shares.

By Mr. Neblett:

Q. What?

A. Pardon me. There were 20,000 outstanding at the time. 12,000 was the capitalization at this time out of a total of 20,000 outstanding at the time.

Q. Mr. Goldie, that was the Seattle Brewing & Malting Company, the West Virginia corporation?

A. Yes, sir.

(Testimony of Joseph Goldie.)

Q. Which owned the stock of the Rainier Brewing Company?

A. That is correct, sir, that is correct.

Mr. Neblett: That is all.

Mr. Mackay: Just a moment.

Redirect Examination

By Mr. Mackay:

Q. Mr. Goldie, do you know whether or not the Century Brewing Company since 1935 has used the Georgetown Brewery as a brewery?

A. No, sir, at no time.

Mr. Mackay: That is all.

Mr. Neblett: That is all.

The Court: Just before the witness leaves the stand, Mr. Mackay, you have offered in evidence the Articles of Incorporation of the Rainier Brewing Company, the corporation [477] that was organized on September 19, 1903.

That is Exhibit 33.

Mr. Mackay: That is right.

The Court: Now, may I have the stipulation of facts, that is, we have three stipulations of facts.

Mr. Mackay: Yes. It is one of re-organization.

The Court: Now, would you indicate to me, as you are acquainted with the paragraphs there, the paragraphs that cover the corporate history of these various companies?

Mr. Mackay: Oh, yes. If your Honor please, this is in Stipulation No. 1, and the re-organization

(Testimony of Joseph Goldie.)

referred to there is the re-organization whereby Pacific Products Company acquires all the assets of the——

The Court: (Interposing) Well, what I want to know how many paragraphs in there describe the facts that give the history of these corporations?

Mr. Mackay: Oh, it is paragraph 1 that has relation to, I mean of the stipulation has to do with that.

The Court: Only paragraph 1?

Mr. Mackay: We have three re-organizations, if your Honor please.

The Court: Well, then, I had better look at this.

Mr. Mackay: And I might state for your Honor's information in 1925 Pacific Products Company was incorporated and it took over all the assets of this Rainier Company, which [478] was organized in 1903 as well as the Seattle Brewing & Malting Company, and that is set up in the pleadings.

The Court: Well, where in your stipulations have you the facts relating to the Seattle Brewing & Malting Company that was organized in 1903, and its organization and ownership of the Rainier Brewing Company which was organized at the same time in 1903? Where are the facts relating to——

Mr. Mackay: (Interposing) They are set forth in the pleadings, if your Honor please.

The Court: They are set forth in the pleadings?

Mr. Mackay: They are set forth in the pleadings.

The Court: May I see the pleadings, please?

The Clerk: Yes (handing documents).

(Testimony of Joseph Goldie.)

The Court: It will save me the time for hunting for this later. I want to know where the facts are because they are scattered all over now.

Mr. Mackay: If your Honor please, I might call your attention to the answer.

The Court: Well, if you don't mind, let me look at the petition first.

I am looking now at paragraph 5 of the petition, which is the original petition filed May 12, 1944. I don't know what the amendments, if any, if there are any, may do to the original petition. But in paragraph 5 it is recited that the petitioner in this proceeding is the California corporation. [479] It doesn't say what year it was organized in.

You have given me a chart which is not marked as an exhibit and probably will have to be marked as an exhibit. But according to this chart the petitioner, which has the name Rainier Brewing Company, Inc., is a California corporation organized in 1932.

Is that correct?

Mr. Mackay: Yes, your Honor.

The Court: Now, what were the assets of the Rainier Brewing Company organized in 1903?

Mr. Mackay: I beg your pardon. I didn't understand you.

The Court: I say what were the assets of the Rainier Brewing Company organized in 1903?

Mr. Mackay: I understand there was just $10,000.

(Testimony of Joseph Goldie.)

The Court: It was a nominal corporation?

Mr. Mackay: That is right.

The Court: It had no assets?

Mr. Mackay: That is right.

The Court: It was not an operating company?

Mr. Mackay: That is right.

The Court: And how many shares of stock were issued?

Mr. Mackay: I understood there were 10,000 or at least that was the total par value; 100 shares I am told. [480]

The Court: A hundred shares. Well, in paragraph V(c) of the petition, pages 3 and 4, it is said that in 1903 the Rainier Brewing Company was organized. It doesn't say who owned the stock of Rainier Brewing Company.

Who did own the stock of Rainier Brewing Company?

Mr. Mackay: The stock was all owned by the Seattle Brewing & Malting Company. I think that is in the stipulation.

The Court: And that is somewhere in the stipulation?

Mr. Mackay: Yes, your Honor.

I might say, if your Honor please, that the only thing that was denied in "C" of our petition was the last sentence where we had alleged in the same year a corporation was organized under the laws of the State of Washington known as Rainier in order to further protect the name of Rainier, and that is the reason I put in this exhibit to show that.

(Testimony of Joseph Goldie.)

The Court: Well, of course, the exhibit in itself doesn't show it.

Mr. Mackay: Well, I mean it shows the date of incorporation.

The Court: Well, that apparently isn't denied.

Mr. Mackay: Yes, your Honor.

The Court: I wanted to be sure what the assets of that company were. [481]

Well, then, as I understand, the parties are agreed that the Rainier Brewing Company, organized in 1903, was an inactive corporation, with no assets other than paid-in capital, which was paid in for its stock. 100 shares of stock with a par value of $100 a share or $10,000 capital, were issued to Seattle Brewing & Malting Company, and that at all times that company, organized in 1903, owned all the stock of Rainier Brewing Company.

Mr. Mackay: Yes.

The Court: Now, when the Pacific Products Company acquired the assets of the Seattle Brewing & Malting Company did they acquire all of the stock of the subsidiary organized in 1903?

Mr. Mackay: They acquired all the assets, your Honor.

The Court: Oh, they acquired all the assets of Seattle Brewing & Malting Company?

Mr. Mackay: Pacific Products Company acquired all the assets of Seattle Brewing & Malting Company as well as all of the assets of the Rainier Company.

The Court: What assets did Rainier Company

(Testimony of Joseph Goldie.)

have? I don't think there is any proof on that point, unless it is stipulated. That is what I am inquiring into now. The Exhibit 33, of course, is just a copy of the Articles of Incorporation and in itself is not evidence of what the [482] assets of the corporation were.

Mr. Mackay: I should have made this clear.

Attached to Exhibit 1, if your Honor please, is a——

The Court: (Interposing) It is attached to Stipulation 1?

Mr. Mackay: Yes, your Honor.

(Continuing)—are two assignments showing what assets were transferred by Rainier as well as by Seattle Brewing & Malting Company to Pacific Products, Ltd.

I might state that subsequent to 1915 the Rainier Company did get other assets.

The Court: Well, Exhibit "B" attached to Stipulation 1 is an assignment from Rainier Brewing Company to Pacific Products Company, Inc., dated October 1, 1925, and it is a brief assignment. It simply recites that "In consideration of $10 Rainier Brewing Company—", which was the corporation organized in 1903, "—transferred all of its assets of every character, including goodwill, trade name, trade mark, trade label, copyrights, and the full benefit thereof, and the party of the second part accepts the foregoing assignment and in consideration thereof assumes all the liabilities of the party of the first part as shown by its books of ac-

(Testimony of Joseph Goldie.)

count on September 30, 1925, not exceeding in the aggregate the sum of $200,060."

And then Exhibit "A" attached to that Stipulation 1 is [483] the assignment from Seattle Brewing & Malting Company to Pacific Products, dated October 1, 1925, and it recites that "In consideration of $10 Seattle Brewing & Malting Company assigns all of its assets of every kind, including its goodwill, trade name, trade mark, trade label, and all of its right, title and interest in and to all real and personal property, and the party of the second part accepts the assignment and assumes all the liabilities as shown by its books of account on September 30, 1925, not exceeding in the aggregate the sum of $29,776.37."

Well, now, that would be very confusing to me. Here is the Rainier Brewing Company, which has no assets except nominal assets, and, nevertheless, according to the assignment, has liabilities at least in the amount of $200,000, whereas the parent company has liabilities in an amount of at least $29,776.00.

These formal indentures often do not state a great many facts; they are formal. And I am wondering now if anywhere in the pleadings which are admitted and in the stipulations that are in the record it is stated what the new worth according to the books of the Rainier Brewing Company was, the company that was organized in 1903, at the time of the assignment in 1925?

(Testimony of Joseph Goldie.)

In other words, you have offered Exhibit 33 for this purpose: To show that the Rainier Brewing Company was [484] organized to hold, as I understand it, the trade name, but, of course, Exhibit 33 doesn't establish that fact. It is a formal Articles of Incorporation and necessarily covers a great deal. It is an all-inclusive authorization to conduct business as a corporation, that is all it is, as a charter; it doesn't establish the fact of what the outstanding stock was at any time, the issued stock, or what the assets were according to books or anything else.

I don't know, of course, now how material that may be, but I do know that a little bit of evidence is a dangerous thing, such as Exhibit 33 because it puts upon me the burden of going through this entire record to find out what Exhibit 33 is supposed to tell me, namely, what assets Rainier Brewing Company had, how they carried it on their books, how the stock of the Rainier Brewing Company was carried on the books of the Seattle Brewing & Malting Company.

That may be very important because of the question presented involving the fair market value in 1913 of the trade name Rainier.

I hope I am not inquiring into this unnecessarily. Counsel can end my inquiry by very quickly answering my questions.

Mr. Mackay: Yes. Well, I think, if your Honor please, if I may be permitted to make this observation, the only purpose in offering the Articles of

(Testimony of Joseph Goldie.)

Incorporation [485] was to show that this was incorporated in the State of Washington in 1903.

The Court: Well, I think that is admitted in the pleadings.

Mr. Mackay: No, that is one thing that was denied, your Honor. That is the reason I had to put it in.

The Court: I thought—well, all right. It may be that the denial was with respect to the words in that paragraph in the petition "—in order further to protect the trade name Rainier."

Now, that involves a conclusion in your statement of a fact in the petition, and it may be that the denial went to that.

I don't think that Respondent would deny that that corporation was organized in 1903, knowing the facts, if respondent knew the facts at that time.

At any rate, at the present time I am quite sure that Respondent won't deny that there was a corporation under that name organized in 1903. Now, that still doesn't answer my question.

What facts are there in the record before me at the present time which answer my question as I have set them forth to you?

Mr. Mackay: Well, may I make this further observation? There was a little dispute between us as to what State [486] this corporation was organized in, and that is the reason we got this.

Now, the witness, I think, Mr. Samet—what I intended to bring out was the corporation was organized merely to protect the corporate name

(Testimony of Joseph Goldie.)

Rainier so that no other corporation could use that because the pleadings all show that the trade name Rainier had been owned all the time by Seattle Brewing & Malting Company, so until the subsequent mergers Rainier didn't have that trade name, and that is the reason we didn't get all the——

The Court: (Interposing) It isn't as simple as that to me, I am sorry, because I don't want to prolong this discussion.

The point is, of course, the Virginia corporation, West Virginia corporation organized in 1903. It had the corporate name of Seattle Brewing & Malting Company.

Mr. Mackay: Yes.

The Court: However, as I understand the facts, after it was organized, and certainly from 1910 on, it sold a product known as Rainier beer.

Isn't that correct?

Mr. Mackay: The Seattle Brewing & Malting Company?

The Court: Yes.

Mr. Mackay: Yes, your Honor.

The Court: It sold a product which bore the name [487] Rainier.

Mr. Mackay: That is right.

The Court: It was using the name Rainier.

Mr. Mackay: That is right, your Honor.

The Court: That is a fact, even though the corporation was not called the Rainier Brewing Company?

Mr. Mackay: Yes, your Honor.

(Testimony of Joseph Goldie.)

The Court: But it was called the Seattle Brewing & Malting Company.

Mr. Mackay: That is right.

The Court: Now, when the Seattle Brewing & Malting Company was organized in 1903 it was a new corporation which succeeded a Washington corporation having practically the same name, which was organized in 1893.

Mr. Mackay: That is right, your Honor.

The Court: Now, did the old corporation sell beer under the name of Rainier?

Mr. Mackay: Yes, your Honor, that is admitted in the pleadings.

The Court: All right. Then from around the turn of the century in 1900 a product was marketed that used the name Rainier?

Mr. Mackay: That is right.

The Court: Now, the corporation, Rainier Brewing Company, was organized in 1903 at the same time that Seattle [488] Brewing Company was organized, and in that corporation appears the name Rainier.

If that is all there is to it, that is fine, but if you are going to argue that Rainier was not an asset, the name Rainier was not an asset of Seattle Brewing & Malting Company because another corporation, Rainier Brewing Company, was organized to hold that name as an asset, then I would say there aren't any facts to show that.

Mr. Mackay: Yes. Well, your Honor——

(Testimony of Joseph Goldie.)

The Court: (Interposing) So I am trying to find out what you are going to argue about in this respect, and it may be very unimportant, but I want it to be put at rest now.

Mr. Mackay: Yes, that is right. I appreciate your Honor bringing this up.

It is our contention that the Seattle Brewing & Malting Company owned the trade name Rainier, and this Rainier Company that was organized in 1903, the only purpose that we put this in for was merely to show it was organized in there merely to protect the corporate name of Rainier so other people couldn't get a corporate name by that, and we are still contending that all the value of the trade was owned by the Seattle Brewing & Malting Company, and we will not argue at all that it belonged to the one that was incorporated in 1903 by the name of Rainier—— [489]

The Court (Interposing): So it is immaterial whether the Rainier Brewing Company had any books and whether it had any assets?

Mr. Mackay: That is the way we have looked upon it, your Honor.

The Court: And it is also immaterial what price or book value the Seattle Brewing & Malting Company put on the stock of Rainier Brewing Company which they held as an asset?

Mr. Mackay: We think that is immaterial.

The Court: That is all immaterial, and it is unnecessary for me to be concerned about it?

Mr. Mackay: I think so.

(Testimony of Joseph Goldie.)

The Court: That is the reason those particular facts have not been stipulated?

Mr. Mackay: Yes. I might make this observation, if it will help clear it: This same company, Rainier, that was organized in 1903, in 1915 operated down in San Francisco, beginning in 1915 as a subsidiary. I think that will clear it up.

The Court: In 1915 it became an operating company?

Mr. Mackay: Yes, your Honor, down here in San Francisco.

The Court: I see. Well, then, when it became an operating company in 1915 then it had to have some assets?

Mr. Mackay: Yes, it got some assets then, if [490] your Honor please.

The Court: That would explain why it had assets and liabilities, as explained in Exhibit "B", attached to Stipulation 1?

Mr. Mackay: That is it, your Honor, yes.

The Court: I see. That clears that up.

Well, then, Pacific Products Company, organized in 1925 as a California Corporation, acquired all of the assets of Seattle Brewing & Malting Company, and one of those assets was the trade name Rainier?

Mr. Mackay: That is right, your Honor.

The Court: And it later, in 1932, must have decided to operate under the name of Rainier Brewing Company, Inc.?

(Testimony of Joseph Goldie.)

Mr. Mackay: Well, there was another reorganization in 1932.

The Court: Did new interests come in then?

Mr. Mackay: Yes, a new corporation was organized.

Mr. Bennion: Paragraph 2 (handing document to Mr. Mackay).

The Court: Now, this witness, then, to get back to this witness' testimony, which we have had to interrupt, Mr. Goldie, was one of the organizers of Pacific Products Company?

Mr. Mackay: Yes, your Honor.

The Court: And purchased stock of Seattle Brewing [491] & Malting Company to the extent of 12,500 shares.

And then, I think, at this point, even if it is a little repetitious, I would like you to clear up where Mr. Goldie comes into the picture in the organization of the Rainier Brewing Company, Inc., organized in 1932, because he has a continuing interest as a stockholder, he and his family appear to have their interest in the Pacific Products Company into their interest in Rainier Brewing Company, Inc.

Mr. Mackay: If your Honor please, if I can call your attention to the stipulation, "In 1932 Pacific Products Company transferred to Rainier Brewing Company, Inc., a California corporation, organized in 1932, its assets of every kind and description, save and except certain designated assets not used in the conduct of its manufacturing business."

(Testimony of Joseph Goldie.)

The Court: Let me see that.

Mr. Mackay: Stipulation No. 1 (handing document).

The Court: All right. Well, I am finished now with this line of inquiry.

Mr. Mackay: That is all, Mr. Goldie.

The Court: Wait a minute! He may have some cross-examination.

Mr. Neblett: No further cross-examination.

Mr. Mackay: Just a minute. I beg your pardon.

The Court: Wait a minute.

Mr. Mackay: Do you mind, Mr. Neblett? [492]

Mr. Neblett: Go right ahead, Mr. Mackay.

By Mr. Mackay:

Q. I will ask you to please examine this statement I hand you and tell me what it is.

A. (Handing document): This is an annual statement of the Rainier Brewing Company, California, December 31, 1940.

Mr. Mackay: If your Honor please, I should like to offer this in evidence as the annual statement of the Rainier Brewing Company for the year ending 1940.

The Court: Without objection, that is received as Exhibit 34.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 34.)

[Petitioner's Exhibit No. 34 appears in Book of Exhibits.]

(Testimony of Joseph Goldie.)

Mr. Mackay: I think that is all, Mr. Goldie.

The Witness: Thank you.

(Witness excused.)

The Court: How about giving the Reporter a rest?

(Short recess.)

Mr. Mackay: Now, if your Honor please, I have here two reports of Dun & Bradstreet, one for the Seattle Brewing & Malting Company, and it is dated August 14, 1941, and one for Rainier, August 26, 1940. And I will state that these were obtained from the Anglo-California Bank, and that if the Bank were here they would testify that they [493] were turned over to the Rainier Brewing Company.

I understand counsel has no objection from that standpoint.

Mr. Neblett: If your Honor please, we object to the substance of these reports. We have no objection to the fact that they were put out by Dun & Bradstreet.

The Court: Yes, I see.

Mr. Neblett: They appear on their stationery which, I think, are authentic and trustworthy, but we object to the substance of the reports.

The Court: Why do you object to the substance?

Mr. Neblett: Could I have a copy of it, Mr. Mackay?

Mr. Mackay? I beg your pardon. Didn't I give you a copy? I think I did yesterday, but I will give you another one (handing document).

Mr. Neblett: If your Honor please, respondent objects generally to the report on account of its content and because it is incompetent, irrelevant and immaterial, and, secondly,——

The Court (Interposing): It is what?

Mr. Neblett: Incompetent, irrelevant and immaterial. And, secondly, we desire to object specifically to the report because the report of Seattle Brewing —the exhibit shows, the proposed exhibit shows on the next to the last page—I am quoting from it, your Honor—"In 1940 an addition to the company's main bottling and shipping plant costing [494] $100,000 was completed. At the same time rights to the use of the former brand name of Rainier beer in Washington and Alaska previously utilized on a royalty basis were purchased for $1,000,000, paying part cash, with the balance due in five years. Additional capital stock was sold, with the proceeds of $600,292.50 and premiums being used to finance a portion of the purchase of the Rainier rights, and the rest added to working funds."

Now, if your Honor please, we seriously object to the conclusional word "purchase" stated in this proposed exhibit.

As your Honor knows, it is our theory in this case that no sale of name occurred and, therefore, no purchase could have been made. We are proceeding down here on the theory that this was a mere license, and these amounts received were advanced royalties.

On that ground, your Honor, we think the conclusional term "purchase" is prejudicial to respondent's position in this case, and we object to the exhibit on that ground.

Mr. Mackay: If your Honor please, if I may be heard for just a moment. We are offering this to show a characterization of the contract which was given to financial houses upon which they—as your Honor well knows, Dun & Bradstreet—upon which reports credit is given.

The rules of evidence, in my opinion, are that as to [495] those things they are admissible. There is one rule of law, I think, that is pretty well established, that you can show by testimony for the purpose of showing the characterization of a contract, or interpretation the parties have given to that contract.

Now, I will grant you, your Honor, it is not offered to be conclusive upon your Honor at all. Your Honor must determine whether this is a sale or whether it is not. But it seems to me the most effective way any Court can determine what a con tract is. And the Supreme Court has said (I think I am quoting almost the language), "Show me what the parties have done under a contract and how they have characterized it and I will tell you what they meant by it."

And I have some authority, if your Honor please, on that.

I am reading from Jones on Evidence:

"When declarations or acts accompany the

fact in controversy and tend to illustrate it or explain it, they are treated, not as hearsay, but as original evidence, in other words, as part of the res gestae.

"It is not a condition of the admission of such evidence that no other can be obtained. The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and are so connected with it as to characterize [496] or explain it.

"It is hardly necessary to add that when the declarations form part of a contract or the performance of a contract they are relevant and will be received."

The Court: What paragraph are you reading from?

Mr. Mackay: 344. And then I read from Section 582:

"It is hardly necessary to cite authorities to the proposition that, as a general rule, newspapers are not admissible as evidence of the facts stated therein. But when proof is made that one has usually read——"

That is not important.

"And when it is shown that a person is the author of or otherwise responsible for statements or advertisements, they may, of course, be used against him."

Now, our position is, if your Honor please, that in both of these instruments I have heretofore

offered, Dun & Bradstreet,—and I may call your Honor's attention to the Rainier, which I shall hand you now, and which is August 26, 1940.

And I call your Honor's attention to the—I think it is the bottom of the page, where it is stated: "Available information is to the effect that operating results during 1940 have continued the 1939 trend with both sales and earnings running ahead of the previous year. An additional [497] favorable development has been the exercising by the Seattle Brewing & Malting Co. of its option to purchase outright the rights to use the name of Rainier in the Pacific Northwest."

I call your Honor's attention to that because we find here in reports given to Dun & Bradstreet both companies, both parties to this contract characterized it as such. And Rainier did it here, I mean in this report on August 26, 1924, just immediately after the transaction, as late as 1941.

We are offering it, if your Honor please, merely to show the characterization on the part of these two contracting parties.

And may I say this, if your Honor please: I think the Rainier Brewing Company has been somewhat handicapped. We did not know the trial was going on up there. There has been some evidence on cross-examination of Mr. Humphrey read out of a transcript there to test his credibility, which, I think, probably was proper. But, if your Honor will recall, Mr. Neblett asked Mr. Humphrey in substance, "Didn't you tell Mr. Allen and the negotiators when they came down that you said, 'Well, are you here

to make a purchase again?' " In another instance it was to the effect that Allen had testified that there was not to be a sale.

Now, those statements are absolutely contrary to this characterization. [498]

Now, the Commissioner of Internal Revenue—we have never objected, and he has the right to take inconsistent positions, but, if your Honor please, those inconsistent positions must be inconsistent positions on a point of law. Justice would be denied if the Commissioner of Internal Revenue, through some technical objection, denied this Court the right to see all the evidence, and particularly the characterizations as given to it by both parties to the contract.

I have another exhibit here that I am going to offer in a minute. I shall come to that. But it does seem to me, if your Honor please, that where an outfit like Dun & Bradstreet gets its information, a bank gets it, gets this information and it extends credit based upon that, and throughout the financial world, those people who are interested in the contract and in what they are doing, it seems to me, if your Honor please, that it is admissible.

Now, it goes to the weight of it, your Honor. I understand your Honor is well able to determine the weight of it. We don't have a jury here. You don't have to have those strict rules of evidence on it.

The Court: That is right.

Mr. Mackay: And it seems to me that counsel's objection is entirely out of order.

Mr. Neblett: If your Honor please,—— [499]

The Court (Interposing): The objection is overruled. The offers are received.

The Dun & Bradstreet report of August 26, 1940, is received as Petitioner's Exhibit No. 35.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 35.)

[Petitioner's Exhibit No. 35 appears in Book of Exhibits.]

The Court: And the Dun & Bradstreet report dated August 14, 1941, is received as Exhibit 36.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 36.)

[Petitioner's Exhibit No. 36 appears in Book of Exhibits.]

Mr. Mackay: Now, if your Honor please, I have another matter that I should like to call your Honor's attention to, and I started yesterday, and I was out of order. Mr. Humphrey had alluded to it. I want to show you——

The Court (Interposing): Well, I just want to say that we were running so close to the end of the day.

Mr. Mackay: Yes, your Honor, that is quite all right. I have no objection to that.

The Court: I knew if we started in on a problem of exhibits that we would be here until six, and I thought we all wanted to leave.

Mr. Mackay: That was quite agreeable. It was not necessary to keep you here.

Now, I want to call your Honor's attention to the Post Intelligencer, the 12th day of April, 1940, under its [500] Financial Editor, Mr. Fred Neindorff, and he said:

"A special meeting of Seattle Brewing & Malting Company stockholders will be held in the next two weeks to exercise the company's option on the purchase of all rights connected with its manufacture and distribution of Rainier beer.

"Plans for the special meeting were outlined at the annual meeting by Emil G. Sick, President, it was announced yesterday following the annual meeting.

"It was reported Seattle Brewing & Malting Company is entertaining alternative plans:

"1. To make an outright cash purchase for $1,000,000 (the amount it would cost to exercise the option) or

"2. To give Rainier Brewing Company five unsecured notes for $200,000, each maturing annually, but each carrying the provision that payment may be made 'on or before' maturity date.

"In a statement issued yesterday Sick commented:

"'The Century Brewing Company built and equipped the Century Brewing Company in 1933 and 1934.'

"In April of 1935 the Century Brewing Company purchased the old Rainier plant at Georgetown and

likewise took over the business of the Rainier Brewing Company of San Francisco in the State of Washington and [501] Alaska.

"In this merger Century Brewing Company took over the old Seattle Brewing & Malting Company. A contract was made with the Rainier Brewing Company of San Francisco to pay Rainier a minimum of $75,000 a year and a certain extra amount of barrelage of over 100,000.

"This payment was to extend for five years and currently run around 100,000 a year. Under the contract the Seattle Brewing & Malting Company is now privileged at the end of the fifth year to make outright purchase for $1,000,000.

"Financing plans to carry out the deal contemplate issuance of new stock to shareholders of Seattle Brewing & Malting Company on terms described by Sick as 'very reasonable.' "

Now, if your Honor please, I should like to offer that in evidence. I think it is competent.

Let me call your Honor's attention to the fact that that is on April 12, 1940, just before the option, just before this important transaction was to be consummated, before they were to exercise their option, and he comes there and he tells the world. And I can show your Honor it is published in the San Francisco papers as well as this, and also in another magazine.

Here is the Brewery Magazine in that same month, [502] containing exactly the same statement, and I hand it to your Honor.

It is not just the garbled words of a reporter, it

is an issued statement, and they are pleading to the citizens of Washington to help them acquire by outright purchase that business, that name, if you will come here and buy this stock, they are putting it out. It is so public, it is so historic that to deny its admission I think would be a grave injustice.

Mr. Neblett: Please, may be be heard on the question?

The Court: Yes.

Mr. Neblett: If your Honor please, in addressing myself to this legal point I want to point out that Mr. Mackay has cited certain authorities which are in no way applicable to the situation here. This is not a characterization by the parties. This is a characterization of what occurred by a newspaper company. We don't have the newspaper party who wrote this article here. We don't know how he got his information. And, as we all know, newspapers get a lot of information wrong.

The same objection to this proposed exhibit goes to the other exhibit. The Dun & Bradstreet reports are not a classification by the parties. They are the classification by Dun & Bradstreet. We don't know what information Dun & [503] Bradstreet had with respect to construing this contract.

Your Honor's position right now is to construe this contract, and, your Honor, when lawyers are having a very difficult time doing it, I assume, your Honor, that a newspaperman is in no better position to do it than we are.

Now, your Honor points up the defect in this type of testimony. It can be so misleading. It is

a conclusional term. And the objection I make to this type of testimony is bound to be sound in that it is a classification by a party who had no access to the contract. And if he had access to the contract he might have been mistaken in his interpretation of whether this contract was a purchase and sale agreement or a lease.

Based on those specific grounds, your Honor, the respondent objects to the introduction of evidence of this character into the record.

Mr. Mackay: I would like to make this observation: For a long time it was not permitted even to put in market reports or anything else into evidence, but finally, because of trying to arrive at justice, the Courts did not stay bound by the rules. They extended a little bit as all these rules have developed, for one purpose, to find out the real facts.

And this is what one Court says with respect to financial matters: [504]

> "As a matter of fact, such reports, which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and Courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the source of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

The Court: Well, that has reference to market quotations.

Mr. Mackay: I appreciate it has, but I am thinking of these other financial reports upon which people rely, especially those from Dun & Bradstreet.

But it does seem to me, if Your Honor please, the Commissioner of Internal Revenue, if finding that case, if our interests had been protected, if that article there had been presented to the Tax Court, that testimony that he referred to here, and tried to upset Mr. Humphrey's testimony, would have been completely repudiated.

Now, it is entirely up to Your Honor, it is well within your discretion. As I say, it goes to the weight of it. It is not conclusive, Your Honor. It is certainly, in my opinion, a very important part of this case. I can't see [505] why the Commissioner of Internal Revenue, if he has taken a neutral position here, as we have heard so many times, and if he wants to be consistent, let him get the facts here on that.

The Court: Well, now, am I correct in understanding that the report in the Seattle Post Intelligencer on April 12, 1940, by Mr. Fred Niendorff, contains a statement issued by Mr. Emil G. Sick?

Mr. Mackay: Yes, Your Honor.

The Court: It appears from the clipping from the newspaper that the reporter has made it perfectly clear that Mr. Sick issued the following statement. Now, Mr. Sick was the President, as I understand it, of the Century Brewing Company, which was a party to the contract that was executed

in 1935, and which is Exhibit 1 in this proceeding.

Mr. Mackay: That is right.

The Court: May I see Exhibit 1, please?

(Document was handed to the Court.)

The Court: That contract was executed April 23, 1935, was signed by Emil Sick as Vice-President of the Century Brewing Association, and that Association is designated as "the party of the second part" to this contract. Therefore, a statement by Mr. Sick, assuming that his quotation has been accurately reported, represents a statement by a party to the contract. [506]

Mr. Mackay: That is right.

The Court: It happens that in this proceeding that is a statement by the other party to the contract, that is, other than the petitioner in this proceeding which was designated as the party of the first part in that contract.

It, therefore, seems to me that the answer to this problem that is raised is to be found in the rule that evidence is admissible of the interpretation of a contract given by one of the parties to the contract.

Mr. Mackay: That is right.

The Court: The objection would be whether this is the best evidence.

Mr. Mackay: Yes.

The Court: Of that interpretation?

Mr. Mackay: Yes.

The Court: And then I think we should go to the point of whether this is the best evidence.

Mr. Mackay: I think that is so.

The Court: On that point you have here some cumulative evidence. The same statement of Mr. Sick is quoted in the Brewer & Dispenser of April, 1940.

Mr. Mackay: Yes.

The Court: Now, in that connection—and I expect that you intend also offering this issue of the Brewer & Dispenser of April, 1940, for the quotation of page 8, is [507] that correct?

Mr. Mackay: Yes, Your Honor. I have a photostat copy.

The Court: Now, we have to remember that a magazine must be prepared for publication, perhaps, several weeks before the date of the publication, that is, the April issue of the Brewer & Dispenser would have to be prepared during March. It might come out shortly before the first of April, and that would indicate that the quotation appearing in the Brewer & Dispenser must have been issued, assuming that Mr. Sick issued to the press a prepared statement prior to April 12, 1940. That gives us a perspective on the newspaper clipping that is offered from the Post Intelligencer for April 12, 1940.

Now, what other evidence have you that would support your contention that this offer does not come within the exclusions of the best evidence rule?

Mr. Mackay: I have a photostat copy of the Examiner of San Francisco on April 13th, if Your Honor please. It is small print, I am sorry.

Mr. Neblett: Mr. Mackay, could we have a copy?

Mr. Mackay: Yes.

The Court: Do you have any statements issued to stockholders relating to the matters to be covered at the meeting of the stockholders that was to be held to settle [508] this problem?

Mr. Mackay: No, Your Honor. We have had no access to that at all in Seattle. This is with respect to Rainier. Rainier would say that same thing at the annual meeting of the stockholders. It is the last exhibit I put in.

The Court: May I see that?

(The document was handed to the Court.)

Mr. Mackay: For Seattle, Your Honor.

The Court: Exhibit 34 is the printed annual statement for the year ended December 31, 1940, of the Rainier Brewing Company, and that reports to the stockholders the receipt of the notes for $1,000,000, and that is characterized as a receipt of $1,000,000 in consideration for sale of certain intangible assets.

Have you any notice to the stockholders issued prior to the meeting? Was there any meeting of the stockholders held or not?

Mr. Mackay: Was there any meeting held prior to——

The Court (Interposing): Of the Rainier Brewing Company?

Mr. Mackay: There was no other statement issued prior to this time. This was the only issue, was it, Mr. Smith?

Mr. Smith: There was only one issue, yes, and this is the annual statement. [509]

The Court: Did the stockholders have to approve the acceptance of the notes?

Mr. Smith: No, Your Honor. It was approved by the Board of Directors.

The Court: Well, it was approved by the Board of Directors.

Do you have a minutes of a meeting of the Board of Directors approving the receipt of the notes under the contract?

Mr. Mackay: We can check that up, Your Honor, at noon time. I am not sure it was—we will check that.

Mr. Smith: Yes.

Mr. Neblett: I think we have something on that, Your Honor.

The Court: I think that the matter ought to be explored a little bit.

Let me say this: I would like to have the best evidence produced, and I think there would be less question, and probably there is very little question about the propriety of receiving in evidence the financial journal reports which you have offered, but doubt upon that would be removed by having some of the corporate records of this party.

Mr. Mackay: Yes, we will be very glad to do that.

The Court: To the agreement.

And so, with that understanding, and I am not [510] indicating one way or the other what the ruling should be on this, but I would say that you might as well re-offer these at the time if you find any minutes of a meeting of the Board of Direc-

tors that would show what the corporate action was at this time.

Mr. Mackay: All right, Your Honor.

The Court: I understand that the corporate action to be taken by the Century Association would, of course, be different than the corporate action to be taken by the Rainier Brewing Company.

Mr. Mackay: Yes.

The Court: And that you are at a disadvantage at being unable to offer records of the other corporation, the other party to the contract.

Mr. Neblett: I have those records here, Your Honor.

The Court: At the same time that obstacle should not stand in the way of your right to show as best you can what interpretation was placed upon the contract by the other party to the contract.

Mr. Mackay: That is right.

The Court: And during the recess, then, I will ask you to look further into the record.

Mr. Mackay: Yes, your Honor.

The Court: Now, is there anything further from the [511] Petitioner?

Mr. Mackay: I have in my hand, if Your Honor please, a statement entitled "Net income for the Years Ended June 30, 1908 to 1915, inclusive, of the Seattle Brewing & Malting Company," which Mr. Sonnenberg, who is in Court, has stated has been made from the records of the company.

I understand there is no objection.

Mr. Neblett: No objection.

The Court: Without objection, that is received as Exhibit 37.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 37.)

[Petitioner's Exhibit No. 37 appears in Book of Exhibits.]

Mr. Mackay: If Your Honor please, except with respect to these exhibits, we shall later offer, that is all the petitioner has.

The Court: Now, what is the respondent's case?

Mr. Neblett: May we proceed, then, Your Honor?

The Court: What I meant to say is, are you going to call witnesses?

Mr. Neblett: Just one minute, Your Honor. Let me consult with my associate.

If Your Honor please, we have quite a few documents to go in evidence, but other than that the respondent will not have any witnesses.

The Court: All right, then, will you proceed to [512] offer your exhibit?

I am going to take a recess for just a minute, please, and you organize those exhibits that you have to offer. You have a good many that were marked for identification. As a matter of fact, I don't think respondent—has respondent any exhibits in?

The Clerk: No.

The Court: They were marked for identification from "A" to "H."

(Short recess.)

The Court: The respondent has some exhibits

to offer and it will take a fair amount of time for respondent to offer those exhibits. It is 12:30 and this is the time we ordinarily recess for lunch. Also the petitioner has made an offer of some exhibits so we have a certain amount now to take care of in the matter of these exhibits.

I would just like to say that I hope you all understand that we are not rushed for time. I allowed the full day for the trial of the case. I want you to understand that we can go on just as long as you want to today, and I am sure we will be able to conclude the hearing today.

I understand, Mr. Neblett, that you had an expert witness, and if you care to call that witness there is no limitation on the time that you can be given, and, perhaps, calling the witness would be helpful to the Court. [513]

We will recess until 2:00 o'clock.

(Whereupon, at 1:30 p.m. a recess was taken until 2:00 p.m. of the same day.) [514]

Afternoon Session, 2:00 P.M.

Mr. Mackay: If your Honor please, we have obtained the certified copy of the minutes that you asked for of the Rainier Brewing Company. I have given counsel a copy, and I should like very much to furnish a copy for the Court, to introduce in evidence.

The Court: Now, what do these minutes show, briefly? Anything we are interested in?

Mr. Mackay: Yes, your Honor. We have the

call of the meeting, and it relates to the $1,000,000.

The Court: Any objection?

Mr. Neblett: No objection, your Honor.

The Court: Petitioner's Exhibit 38.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 38.)

[Petitioner's Exhibit No. 38 appears in Book of Exhibits.]

Mr. Mackay: Now, if your Honor please, I would like to make a formal offer of the——

The Court (Interposing): Are you going to offer that or the photostat?

Mr. Mackay: I think I have a photostat. Well, we can offer this, your Honor. We have the photostat.

The Court: The objection has been made. I am going to receive that for what it is worth.

All right, received as Exhibit 39.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 39.) [515]

[Petitioner's Exhibit No. 39 appears in Book of Exhibits.]

Mr. Mackay: And I should like also, if your Honor please, to offer an article on Page 8 of the Brewer and Dispenser, dated April, 1940.

The Court: And that is subject to the same objection.

I am receiving that with the same statement. These are received. There is some limitation on

the value of these offers, but they are evidence of what has appeared in the press, presumably as authorized statements of Mr. Sick. Received as Exhibit 40.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 40.)

[Petitioner's Exhibit No. 40 appears in Book of Exhibits.]

Mr. Mackay: And I should like to offer in evidence a photostatic copy of the Examiner of San Francisco, April 13, 1940.

The Court: Now, that doesn't have a direct quotation, does it?

Mr. Mackay: No, your Honor.

The Court: I think objection to that type of evidence is sustained in that instance.

Mr. Mackay: O.K. That is all, your Honor.

The Court: That concludes the Petitioner's case?

Mr. Mackay: Yes, your Honor.

May I make this request? That I have this photostated, [516] the Brewer and Dispenser, and substitute it?

The Court: Yes, a photostatic copy may be substituted for Exhibit 40.

Mr. Mackay: Yes.

The Court: Mr. Neblett?

Mr. Neblett: May we proceed, your Honor?

The Court: Yes.

Mr. Neblett: If your Honor please, at this time

Respondent offers in evidence his exhibits for identification "A" to "H," inclusive.

The Court: Now, have you photostats of those?

Mr. Neblett: And asks the privilege to withdraw these exhibits and substitute photostats.

The Court: Any objection?

Mr. Neblett: We will furnish a copy to opposing counsel.

The Court: Is there any objection?

Mr. Mackay: I have no objection, your Honor, except that we have some marks in there. We want one or two more pages to go in.

Mr. Neblett: If you will show me what you would like marked.

The Court: I wish you had done that during the recess. You were waiting for me to come back. That should have been done. You will have to do that later. [517]

Mr. Mackay: All right.

The Court: Mr. Neblett, let Mr. Mackay see the books. Maybe, he can find the pages he wants in the other books.

Mr. Neblett: All right. If your Honor please, at this time Respondent——

The Court (Interposing): In general, Mr. Mackay, is there any objection to these quotations from these books?

Mr. Mackay: No, your Honor, I have no objection to them.

The Court: All right.

Mr. Neblett: Do you want me to introduce them one at a time?

The Court: No. Exhibits marked for identification as "A" to "H," inclusive, are received in evidence, and substitute photostat copies of the pages may be substituted.

(The documents referred to, heretofore marked as Respondent's Exhibits "A" to "H," inclusive, for identification, were received in evidence as Respondent's Exhibits "A" to "H.")

[Respondent's Exhibits "A" to "H" appear in Book of Exhibits.]

The Court: And it is understood that counsel for Petitioner will indicate to Mr. Neblett what other pages he wants to have included in these exhibits. Now, on that point, if Mr. Neblett doesn't agree, and doesn't want to have extra pages of the parts of his exhibits, then I suggest that you have some of these pages offered as your own exhibits.

Mr. Mackay: Yes, your Honor.

The Court: That can be worked out between you at the conclusion of the hearing.

Mr. Neblett: If your Honor please, we want to read into the record at this time a few excerpts from a protest submitted to us by John F. Forbes & Company. Mr. Forbes was on the stand yesterday.

Mr. Mackay: May I see it?

The Court: A protest?

Mr. Neblett: It is dated October 15, 1942, in connection with this case.

The Court: What is the purpose of that?

Mr. Mackay: It has some declaration of interest

and some matters which support our theory in this case.

The Court: I see.

Mr. Mackay: Mr. Neblett, may I inquire, I see that this appears to be an original, but I don't see the signed,—are you correct when you say it is a protest?

Mr. Neblett: Well, I will tell you what it is.

Mr. Mackay: Have you got a copy of it? Was it signed, or anything like that? That is what I am trying to find out just for information. I just wanted to know.

Mr. Neblett: No, I don't think—all I know about it is that it is on the stationery of Forbes and Company.

Mr. Mackay: We are not denying that. I am just [519] trying to find out if that is really a protest. You designated it as a protest.

Mr. Neblett: I wouldn't like to call it a protest; to be exactly accurate, it is a communication.

The Court: Why don't you call it a communication?

Mr. Neblett: It is a communication from Mr. Forbes on the stationery of John F. Forbes and Company.

The Court: Do you want to offer the whole thing?

Mr. Neblett: No, your Honor.

Mr. Mackay: Why not?

Mr. Neblett: I want to read it into the record. If Mr. Mackay wants to offer the whole thing we would have no objection, your Honor.

As we understand the rule, if we read part of it he can ask that the rest go in if he cares to do so.

The Court: All right.

Mr. Mackay: I think, if you read it, the whole thing ought to go in.

Mr. Neblett: I am just going to read certain excerpts. If you want to put the balance in you can have that privilege.

The Court: All right, Mr. Neblett, will you proceed.

Mr. Neblett: "The first step in determining the goodwill value of the name Rainier Beer is to calculate the [520] goodwill value of the company manufacturing and distributing this product. This total figure will be a composite of (a), the goodwill of the trade name Rainier Beer insofar as that contributes to the profitability of the company, and, (b), all other goodwill elements enjoyed by the company.

"2. The second step in determining the goodwill value of the trade name Rainier Beer is to eliminate from the figure $1,206,213.36, just calculated, all contributions to the excess profits of the Seattle Brewing and Malting Company made by factors other than the trade name Rainier Beer. The remainder will be the goodwill value of the trade name to the extent that that was reflected in the excess earnings of the company."

Continuing to read:

"The advertising policy of a manufacturing company is only one factor contributing to its goodwill.

In this case only the good name of the product benefitted by advertising.

"Other factors listed in accounting treatises which should be considered in determining the company's separate goodwill are: (a) The company's reputation for honesty and fair dealing; (b) the unusual devotion of both management and employees to the best interests of the customers; (c) The enjoyment of a monopoly position in the trade, and, (d) The occupation of particularly advantageously placed business premises." [521]

"There is no doubt as to the integrity of the Seattle Brewing and Malting Company, its officers and employees. The question is to what extent this could be treated as a business asset. The morales in trade of the management could be expected to have little influence on retail purchases of beer, but under normal circumstances might greatly affect wholesale distribution.

"The situation which prevailed in Washington in 1913 and previous years was unusual and operated to nullify this influence. In Washington beer was distributed through a licensing system under which the brewer would set up the saloon, or acquire the license of a saloon, and the captive saloon would then dispose of only the beer of the licensed holding brewery."

Skipping over some.

"As indicated above, no amount of esprit de corps and readiness to perform special services for wholesale purposes by officers of the Seattle Brewing and Malting Company would have any great influence

on the company's dealings with its captive outlets. The latter were committed by self interests to push the sales of the company's product."

"It has already been pointed out that the liquor business in Washington was highly competitive. In heavy beer consuming sections there might be saloons on all four corners of a given street intersection, each selling the beer [522] of its licensed holder."

Your Honor referred to that in some of your questions.

"The advantage enjoyed by the saloons selling Rainier beer were not one of location, as noted above, of possessing the exclusive right to sell Rainier beer. There is no suggestion in the foregoing analysis that the value of the Seattle Brewing and Malting Company, divorced from the trade name of its product, would have sunk to the salvage value of the plant."

That is quite interesting there, your Honor, so interesting I would like to repeat.

"There is no suggestion in the foregoing analysis that the value of the Seattle Brewing and Malting Company, divorced from the trade name of its product, would have sunk to the salvage value of the plant. On no account need this have followed.

"The calculations shown in Section 1 above are predicated on the assumption that the given management and plant could have continued indefinitely to earn a very succesful return of 8 per cent on the investment in intangible assets."

And continuing further: "No formula exists to

measure the value of this aspect of trade name and good will. Its monetary value can only be determined at the time of the [523] sale by the operation of the respective bargaining power of buyer and seller, and even then extraneous factors tend to enter. This element of good will value can very easily persist even if there were no excess profits, and might still conceivably obtain if the company were operating at a loss."

That, your Honor, is as much as we care to read in this document.

The Court: What is the date of the document?

Mr. Neblett: The document is dated October 15, 1942.

The Court: Is there a forwarding letter attached to the document?

Mr. Neblett: Yes, your Honor, there was a forwarding letter.

The Court: What did that forwarding letter say?

Mr. Neblett: Now, let's see here. We have got two of them, your Honor. Let me see the other one.

Your Honor, I have two of these, and I have got a forwarding letter dated January 26, 1943. Just a minute. Let us check into that.

Your Honor, the forwarding letter is dated January 26, '43. If this is a proper forwarding letter—we got two of these memorandums. Now, the memorandum is dated San Francisco, October 15, '42, and the forwarding letter is dated January 26, 1943. Apparently, they wrote it [524] up some

time back and then forwarded it to us later.

The forwarding letter states: "Dear Mr. Clack——

The Court: Who is Mr. Clack?

Mr. Neblett: Mr. Clack is our engineer, he is the gentleman sitting right over there, your Honor (indicating).

"Mr. James F. Clack,

Internal Revenue Agent,
74 New Montgomery Street,
San Francisco.

Dear Mr. Clack:

"In re Rainier Brewing Company.

"We enclose copy of a memorandum relating to the March 1, 1913, value of the trade name Rainier applicable to the State of Washington, Territory of Alaska.

"Yours very truly,

John F. Forbes Company."

And the letterhead has down on the left-hand side, the bottom, the word "enclosure," and it is on the stationery of John F. Forbes and Company, Certified Public Accountants.

Mr. Mackay: Let me just take a look at that.

Mr. Neblett: Now, if Mr. Mackay cares to introduce the rest of the document we have no objection, your Honor.

The Court: All right. Now, what next? [525]

Mr. Mackay: You may proceed.

Mr. Neblett: All right. If your Honor please, at this time Respondent offers in evidence a certified copy entitled "United States of America, State of Washington——"

The Court: (Interposing) Is that the certificate about the enactment of the prohibition law?

Mr. Neblett: Yes, November 3, 1914.

Mr. Mackay: Oh, there is no objection to that.

The Court: All right, received as Exhibit "I".

(The document referred was marked and received in evidence as Respondent's Exhibit "I".)

[Respondent's Exhibit "I" appears in Book of Exhibits.]

Mr. Neblett: Your Honor, we have spoken about captive saloons and the ones that were owned by Seattle Brewing and Malting Company in the State of Washington.

I offer in evidence a schedule showing such saloons owned by Seattle Brewing and Malting Company from 1908 to 1913 in the State of Washington.

The Court: Any objection?

Mr. Mackay: No objection, your Honor.

The Court: Received as Exhibit "J".

(The document referred to was marked and received in evidence as Respondent's Exhibit "J".)

[Respondent's Exhibit "J" appears in Book of Exhibits.]

Mr. Neblett: If your Honor please, Respondent

asks that there be received in evidence the income tax return of the Seattle Brewing and Malting Company for the year ended [526] December 31, 1915.

The Court: What is the purpose of that?

Mr. Neblett: It shows that this company suffered a loss in that year.

The Court: Without objection that is received as Exhibit "K" with leave to substitute a photostat copy.

(The document referred to was marked and received in evidence as Respondent's Exhibit "K".)

[Respondent's Exhibit "K" appears in Book of Exhibits.]

Mr. Neblett: If your Honor please, Respondent asks there be received in evidence a letter on the stationery of Seattle Brewing and Malting Company, dated September 29, 1916, where they claim a large loss for abandonment of their brewery plant. Mr. Mackay has been furnished with a copy.

Mr. Mackay: Have I? Well, there is certainly no objection to that.

The Court: Received as Exhibit "L".

(The document referred to was marked and received in evidence as Respondent's Exhibit "L".)

[Respondent's Exhibit "L" appears in Book of Exhibits.]

The Court: I am not going to keep on saying

that you can substitute photostat copies. That should be understood.

Mr. Neblett: Yes, that is very fine.

Mr. Mackay, if it develops that you don't have a copy you are very welcome to it.

Mr. Mackay: Thank you kindly.

Mr. Neblett: Or any other document that we have. [527]

If your Honor please, I want to indicate at this time that a claim for abatement is attached to the return of Seattle Brewing and Malting Company for the year ended December 31, 1915.

Respondent offers in evidence the corporate return of Seattle Brewing and Malting Company for the year ended December 31, 1916, which shows a loss.

Mr. Mackay: No objection.

The Court: Received as Exhibit "M".

(The document referred to was marked and received in evidence as Respondent's Exhibit "M".)

[Respondent's Exhibit "M" appears in Book of Exhibits.]

Mr. Neblett: Respondent offers in evidence the corporate return of Seattle Brewing and Malting Company, West Virginia corporation, for the year 1917, which return shows a gain, your Honor.

Mr. Mackay: No objection.

The Court: Shows a gain?

Mr. Neblett: A gain.

The Court: Received in evidence as Exhibit "N".

(The document referred to was marked and received in evidence as Respondent's Exhibit "N".)

[Respondent's Exhibit "N" appears in Book of Exhibits.]

Mr. Neblett: If your Honor please, these are older returns, and we can't figure them quite as rapidly as we can the newer returns.

Respondent asks that the corporate income and profits tax return for Seattle Brewing and Malting Company for the calendar year 1918 be received in evidence.

Mr. Mackay: No objection.

The Court: Received as Exhibit "O".

(The document referred to was marked and received in evidence as Respondent's Exhibit "O".)

[Respondent's Exhibit "O" appears in Book of Exhibits.]

Mr. Neblett: That return shows a loss.

Respondent asks that the corporate income and profits tax return for 1919 be received in evidence, your Honor.

Mr. Mackay: No objection.

The Court: Received as Exhibit "P".

(The document referred to was marked and received in evidence as Respondent's Exhibit "P".)

[Respondent's Exhibit "P" appears in Book of Exhibits.]

Mr. Neblett: Respondent asks that there be

received in evidence Seattle Brewing and Malting Company corporation income and profits tax return for the calendar year 1921.

Mr. Mackay: Still no objection.

The Court: Received as Exhibit "Q".

(The document referred to was marked and received in evidence as Respondent's Exhibit "Q".)

[Respondent's Exhibit "Q" appears in Book of Exhibits.]

Mr. Neblett: Would you indulge me to speak to the opposing counsel a minute?

If your Honor please, we offer in evidence a copy of a letter addressed to Seattle Brewing and Malting Company, West Virginia, showing an obsolescence of good will April, 1918. [529]

Mr. Mackay: No objection.

The Court: (Examining document) Well, what is this?

Mr. Neblett: I have furnished copies to opposing counsel.

That simply means, your Honor—that is in connection with the obsolescence of good will.

The Court: But what is the document? Is it a letter from the Bureau to the Seattle Brewing Company, or what is it?

Mr. Neblett: That is my understanding of it.

Mr. Mackay: That is what I thought you said. That is why I made no objection.

The Court: I don't know what weight to attach to this. It has a lot of initials at the bottom of it.

Mr. Neblett: That is our copy of it, your Honor. The original went to Seattle Brewing and Malting for that period, and it explains——

The Court: (Interposing) No, this is not at all clear.

Is this supposed to be a determination by the Commissioner that they were entitled to receive a deduction for obsolescence of good will? What does it mean? If so, did they receive it? Did they claim it? Did they take it? What is it? I don't know what this is. [530]

Mr. Neblett: Well, I can explain it to you, your Honor. I am simply saying that it involves the tax benefit that we have stipulated they got as of 1918 and 1919. It, to a certain extent, explains that tax.

The Court: What is that stipulation, then, so that I can tie that Exhibit up with the stipulation?

Mr. Neblett: Yes. It is stipulation 3.

The Court: Let me have stipulation 3, please.

(Examining document) Well, I wish you could tie it up with your stipulation. All that I see is that in 1920 Seattle Brewing filed a claim for abatement of taxes, there is an allocation of $400,000 for the years '18, '19 and '20.

Mr. Neblett: If your Honor please, we have decided here that these two letters simply are explanatory of the stipulation, and instead of explaining it they may confuse it. Respondent is willing to stand on the stipulation just like it is.

The Court: What stipulation?

Mr. Neblett: The stipulation No. 3 with respect to the obsolescence allowed.

The Court: Well, then will you point out to me in stipulation No. 3 where there is any reference to obsolescence allowed? Here is stipulation No. 3. I can't find it. [531]

Mr. Neblett: Very well, your Honor.

If your Honor please, the stipulation says:

"Petitioner's predecessors, Seattle Brewing and Malting Company, the West Virginia Corporation, and Rainier Brewing Company, the Washington corporation, filed income tax returns for the years '18, '19 and '20 but claimed no deductions therein for obsolescence of good will,"——

The Court: I don't know why everyone has all of a sudden decided to whisper, so would you all speak up. I have been dropping my voice, but all of a sudden everybody has gotten so quiet.

Mr. Neblett: The stipulation states, your Honor, that "Petitioner's predecessors, Seattle Brewing and Malting Company, the West Virginia corporation, and Rainier Brewing Company, the Washington corporation, filed income tax returns for the years '18, '19 and '20 but claimed no deductions therein for obsolescence of good will or trade name.

"In July, 1920, Seattle Brewing and Malting Company, the West Virginia Corporation, filed a claim for abatement of taxes for the year 1919, a photostatic copy of which is attached hereto, marked Exhibit 1, and made a part hereof. The Commissioner of Internal Revenue thereafter, in 1924, in lieu of the amount of $542,240.27, stated in Schedules "E" and "F" of Exhibit "I" attached hereto, computed an amount of $406,680.20, which was

arrived at by using the same figures [532] as those used in Exhibit "I" attached hereto, but changing the capitalization rate from 15 per cent as used in Exhibit "I" to 20 per cent. The Commissioner allocated said amount of $406,680.20 to the following years in the following amounts: Year 1928——"

The Court: (Interposing) I read all of that. What has that got to with obsolescence of good will? That interests me, that there somewhere is lurking behind all of this a deduction for obsolescence of good will. And I would like to have it made clear that at one time they took a tax deduction and got some benefit for it. That is very important.

Mr. Neblett: Exactly.

The Court: But there is something difficult about this. Now, if you could show me—I don't want to take up a lot of time with this, but it may be that the claim for abatement had something to do with the net result of a lot of deductions, and I don't know what it had do with it.

But what is there in those schedules that points out that a deduction for obsolescence of good will entered into what is set forth on Pages 1 and 2 of that stipulation? Is there anything?

Mr. Neblett: Yes, your Honor. As I understand it——

The Court: (Interposing) Well, can you point it [533] out to me over the desk here? Maybe, I can see it faster than I can listen to it.

(Examining document) Well, let's pass it and have a conference about it later.

Mr. Neblett: Very well, your Honor.

The Court: What other exhibits have you to offer?

Mr. Neblett: It is an involved situation and we will take it up later.

The Court: It must be.

Mr. Neblett: If your Honor please, Respondent offers in evidence at this time the corporation income tax return for the calendar year 1942 of Seattle Brewing and Malting Company.

The Court: What is the purpose, please?

Mr. Neblett: To show their earnings or loss during that period of time.

The Court: What is the purpose of all of these returns showing gains or losses in these background years?

Mr. Neblett: Well, just to show, your Honor, that during that period of time this corporation was not making any money and for that reason the good will was of no practical value, or, for that matter, dead. That is the purpose of it.

Mr. Mackay: Well, then, if your Honor please, if that is the purpose I object on the ground it is incompetent, irrelevant and immaterial, doesn't even show that the [534] value of the good will did not exist. It is not proper evidence.

Mr. Neblett: All right, that is the purpose for which they are offered, your Honor.

Mr. Mackay: I can't see, if your Honor please, how a return would show whether the good will is how much, or any, we have taken an awful lot of time here to try and prove good will. We couldn't do it by a return.

Mr. Neblett: We are not going to take much time, your Honor. We think it shows a history right down to date. We want to bring it right up to date.

The Court: The question has been to determine the fair market value of good will on March 1, 1913, and we know that there was a contract entered into in 1935, and that payment was made in 1941—is that when——

Mr. Mackay: (Interposing) 1940.

The Court: 1940.

Mr. Mackay: Yes, your Honor.

The Court: Now, between 1915 and 1935 why should we be inquiring into the earnings and profits of the business?

Mr. Mackay: I see no reason why we should, your Honor. It has no bearing upon the points here. There is only two points in this case, first the legal question of whether it is a sale, the other, what the fair market value on March 1, [535] 1913, was. It seems to me it is unduly burdening the Court and everyone else to put all these records in. I think they are entirely incompetent, irrelevant and immaterial to the issues of this case.

The Court: There was a change in Washington when the State Prohibition Act was adopted in 1914. Then I understood that they moved the main office to San Francisco, so then I suppose they concentrated on areas outside of the State of Washington.

Mr. Mackay: That is correct.

The Court: They continued in business, and

these returns are returns for the entire business as conducted in these taxable years.

Mr. Neblett: That is right.

The Court: And they haven't anything to do with the business as conducted in the State of Washington?

Mr. Neblett: Well, we are dealing—it is our theory, your Honor, and we hope to show by these returns that this good will was extinguished during that period of time.

The Court: Well, now, if you get together all of the returns and have them in your hand at one time and just tell me that you have the returns for a certain number of years you want to offer—how many more years are you going to offer?

Mr. Neblett: I have them right in my hand here together. [536]

The Court: I would rather have them all at one time.

Mr. Neblett: All right. I didn't understand you wanted them all at one time.

The Court: I think they are immaterial, but I will let them come in for what they are worth, but I don't want to give more than three minutes to receiving some immaterial evidence.

Mr. Neblett: There are quite a few of them, your Honor.

The Court: That is all right, if you just read into the record you have the returns for the years '22, '23, '24, '25, '26, and get it over with.

Mr. Neblett: All right, your Honor.

The Court: Then you have one purpose for

offering all of them, but I am timing you. It takes you at least three minutes to offer each one, to walk from one table over to the next table and hunt around, and whisper to those returns, and pat them on the back, before you come over and put them down on the table, and you have taken such good care of those returns before you give them to me. I just wanted to get it all over with and get it done. It is a painful operation for everybody.

Mr. Neblett: It certainly is.

The Court: And just get through this misery as [537] soon as we can.

Mr. Neblett: If your Honor please, Respondent offers in evidence the returns of Seattle Brewing and Malting Company for '22, '23, '24, '25, '26, '27, (at '27 it becomes the Pacific Products Company) and '28, Pacific Products Company, Inc.; '29, Pacific Products Company, and 1930, Pacific Products Company; and 1931, Pacific Products Company; and 1932, Pacific Products Company.

Respondent offers these returns in evidence.

Mr. Mackay Same objection.

The Court: All right, I will receive them for whatever they are worth and they will be numbered Respondent's Exhibit "R" next order going into the second alphabet to "AA", "BB", and so forth.

Mr. Neblett: If your Honor please, Respondent offers in evidence the Corporation Income Declared Value Profits Return of Rainier Brewing Company for the calendar year 1940, and the Corporation Return of Rainier Brewing Company for the calendar year 1941.

The Court: Those are received in evidence and will be numbered as Respondent's Exhibits next in order.

Mr. Neblett: If your Honor please, Respondent asks that there be received in evidence an extract of the minutes of the regular meeting of the Board of Trustees of Seattle Brewing and Malting Company, held April 10, 1940. [538] Counsel has been furnished a copy of this minute. It pertains to the exercise of the option in this case and is taken from the minutes of the Seattle Brewing and Malting Company's minute book.

Mr. Mackay: Now, if your Honor please, counsel had told me that he meant to put this in the other case, and he told me that he couldn't get a copy in time to come to the Tax Court, so I told him, of course, I wouldn't require that on his statement that a true copy was put in as Exhibit 8 in that other case.

Mr. Neblett: That is right.

Mr. Mackay: I objected to it, however, not on the ground that it isn't properly identified, but on the ground that it doesn't appear to be an action of any Board of Directors or anybody having authority of the Seattle Brewing and Malting Company. It is not a minute of the Board of Directors in any sense of the term.

The Court: Let me see that, please.

Mr. Neblett: Yes, your Honor (handing document).

I can explain, if your Honor cares to have an explanation.

The Court: What was the Board of Trustees of Seattle Brewing and Malting Company?

Mr. Neblett: It was the directors and officers of the Company, your Honor. [539]

It was taken from the minute book.

The Court: Well, it is a meeting of Directors and it is not a meeting of stockholders, so what is it?

Mr. Neblett: As I understand, the Board of Trustees is the ones who are in control of the company.

The Court: Well, it may be a term we are not acquainted with. Do you know what this is?

Mr. Neblett: Yes, your Honor, that is an extract from the minutes of the Seattle Brewing and Malting Company's minute book. That was introduced in evidence as Exhibit 8 in Docket No. 2265.

The Court: Well, how was it described in the transcript of the other case?

Mr. Neblett: In the transcript, Exhibit 8, page 40:

> "Mr. Jones: I offer in evidence as Petitioner's Exhibit No. 8 an extract from or copy of the minutes of the meeting of the Trustees of Seattle Brewing and Malting Company held April 10, 1940.
>
> "Mr. Neblett: No objection, with the understanding I know what it is.
>
> "Mr. Jones: Yes.
>
> "Presiding Officer: It will be received as Petitioner's Exhibit No. 8.
>
> "(The document referred to was marked

and received in evidence as Petitioner's Exhibit No. 8.)" [540]

[Petitioner's Exhibit No. 8 appears in Book of Exhibits.]

The Court: What is the purpose of the offer?

Mr. Neblett: The purpose of the offer, your Honor, is to show how the Seattle Brewing and Malting Company treated this transaction in the minute book.

The Court: Is that what this shows?

Mr. Neblett: I think so. It shows that—I don't have a copy, because your Honor has it.

It says there that the——

The Court (Interposing): Well, it says the President called attention to the contract, and then it says that the volume of the Company's business had been such the annual royalty was now running to $100,000. And it says that "In view of the prospective increase in the Company's business it would seem that it might be advantageous—" to do certain things.

"However, there are some matters connected with the contract which may require negotiation and possibly lead to some amendments. No definite recommendation can be made. It is the sense of the meeting that this course should be adopted, that is, that the whole matter should be left to the officers of the company for further consideration, negotiation and report."

Mr. Mackay: Yes, your Honor.

The Court: "There being no further business the meeting adjourned." [541]

So what does it prove?

Mr. Mackay: There is no corporate action whatever.

The Court: It doesn't prove anything whatever. They had a problem. They said they were going to leave it up to the officers of the company to discuss and negotiate.

Mr. Neblett: It contains this statement, your Honor: "The contract can be terminated at any time without further liability for future royalty payments."

The Court: Well, I can't accept that as proof of anything, Mr. Neblett. I don't care if it was received in evidence in the other case. It is one of these loosely drawn things that represents something of a stenographic report of what was said at a meeting, and I don't know even whose opinion that was, as to what the contract provided. And it doesn't represent any final interpretation of any kind. It is a little statement that is inserted in the minutes of a meeting where nothing was done excepting to refer to a problem and say that it should be left to the officers to negotiate.

Furthermore, I think the point is ambiguous because later on it says there that whatever they were worried about, which isn't very clear, they thought that the contract might have to be amended.

Now, what does that mean?

Mr. Neblett: Very well, your Honor. [542]

The Court: For the record, the returns that

were offered in evidence by the respondent have been marked by the Clerk as Respondent's Exhibits "R" to "DD" inclusive.

(The documents referred to were marked and received in evidence as Respondents Exhibits "R" to "Z" and "AA" to "DD" inclusive.)

[Respondent's Exhibits "R" to "Z" and "AA" to "DD" appear in Book of Exhibits.]

Mr. Neblett: If your Honor please, I would like to ask Mr. Mackay at this time: Yesterday, we questioned Mr. Forbes about certain bills receivable in one of your exhibits.

Were you able to produce that information, Mr. Mackay?

Mr. Mackay: I understand that we were not, Mr. Neblett.

Isn't that right, Mr. Sonnenberg?

Mr. Sonnenberg: That is right.

Mr. Mackay: We have no figures available. It is a long time ago, 30 years ago, and we don't——

Mr. Neblett (Interposing): And Mr. Forbes' testimony is all you have on that?

Mr. Mackay: Yes.

Mr. Neblett: Very well.

The Court: That had not to do with accounts receivable but with investments, isn't it, on your balance sheet? [543]

Mr. Neblett: That is right.

Mr. Mackay: That is right, your Honor.

The Court: You were trying to tie that up with whatever you thought might be due and owing from captive saloons.

Mr. Neblett: That is right. We contend it was not investments but advancements to captive saloons. Your Honor recalls the situation.

Respondent calls Mr. Clack at this time, your Honor.

JAMES M. CLACK,

called as a witness by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name?

The Witness: James M. Clack, C-l-a-c-k.

By Mr. Neblett:

Q. Mr. Clark, what is your full name?

A. James M. Clack.

Q. And what is your present position?

A. Appraisal Engineer in the Bureau of Internal Revenue.

Q. How long have you been employed with the Bureau? A. Since 1922, January, 1922 [544]

Q. Starting with 1890 give us just a brief resume of your history, Mr. Clack.

A. I graduated from high school in 1890, studied engineering at the University of Missouri, in 1895 was unable to get any engineering work and ran for the office of City Tax Collector and was elected, the City of Nevada, Missouri, held that office for four years. In 1900 was appointed City Engineer of the City of Nevada, and was elected County Sur-

(Testimony of James M. Clack.)

veyor, Road and Bridge Commissioner, and held that office until 1912; those offices.

During those years I was a member of the City and County Board of Equalization which reviewed values of city and county property, and listened to appeals of taxpayers who thought their appraised values, assessed values were too high.

From 1912 until 1918 I was in the contracting business. In August, 1918, I went to work for the United States Shipping Board as Resident Engineer in Charge of Construction of a drydock at Jacksonville, Florida, shortly afterwards was made Assistant District Engineer of the Jacksonville District, and the following year was made District Engineer of Shipyards, Plants Division, Shipping Board, for the Southern District, with headquarters in New Orleans, held that position until 1922, when I received an appointment as, first entitled mortization engineer, shortly afterwards changed to Appraisal [545] Engineer, and have been on that work since that time.

In 1925 I was made Chief of the Appraisal Section of the Engineer Evaluation Division and held that position until 1925, and then as a result of ill health was given an assignment in Hawaii for two years, at the end of that time requested a transfer to San Francisco and have been here since.

Q. Now, Mr. Clack, what has been your experience with respect to appraisal of breweries?

A. During the years '23, '24 and '25 I examined several breweries' claims for obsolescence, made ap-

(Testimony of James M. Clack.)

praisals of the breweries for their value, or loss of value resulting from prohibition, including Schlitz Milwaukee for one and the United States Brewing Company of Chicago; several.

During that time I also examined a large number of appraisals, I supervised their inspection as chief of the section, appraisals prepared by the American Appraisal Company, Haskens & Sells, Price-Waterhouse, Ford-Baker and Davis, and a number of national accounting firms. Without intending to reflect on any of those, I might say during that time I was impressed by the fact that a large number of those appraisals, made up of several imposing looking volumes, contained a mass of detailed data which we were compelled to revise because they reached a sum total which, in our opinion, did not represent the amount that a practical business man [546] would have paid for the property.

Q. Did you examine all the breweries in San Francisco?

A. I have inspected all of them for the purpose of determining the rates of depreciation allowable on their equipment. I have made no appraisals of any of them.

Q. Yes. Now, Mr. Clack, were you asked to value at March 1, 1913, the sole and exclusive, perpetual right and license to manufacture beer, ale and other alcoholic malted beverages within the State of Washington and Territory of Alaska?

A. Yes, sir.

(Testimony of James M. Clack.)

Q. Under the trade name Rainier?

A. Yes, sir.

Q. And what investigation did you make with respect to forming an opinion with respect to that value?

A. I went to—I think I might explain that the return of the Rainier Brewing Company for the year 1940 reported sale of this trade name and set forth a March 1, '13, value which the Bureau instructed should be examined and investigated.

The Court: Just at that point let's have the return of the taxpayer for the taxable year.

What exhibit is that?

(The Clerk handed the document to the Court.)

The Court: So long as you are on that, would you just point out to me where that item is covered in the return? [547]

The Witness: Your Honor, this is the schedule of the instruction for the Engineering and the Evaluation Division requiring an investigation, and this is the schedule in the return.

The Court: This is the schedule that was inserted in the return by the taxpayer?

The Witness: And formed part of the return as filed, yes.

The Court: Well, did the item figure in the computation of net income for the year 1940?

The Witness: They explain in that schedule that "We reported no taxable income because there was neither gain nor loss."

(Testimony of James M. Clack.)

The Court: Well, why did they report that there was neither gain nor loss?

The Witness: They had no cost for the trade name, so that on the basis of cost it would have all been taxable, but the March 1, '13, value as claimed was in excess of the reported sale price. Since the sale price was greater than cost and less than the March 1, '13, value it is claimed there would be neither gain nor loss.

The Court: All right, Mr. Clack, will you continue?

The Witness: The direction of the Bureau to investigate the matter was based, of course, upon the facts [548] shown in the return. When I examined the agreement under which the payment was made the question arose as to whether it should be considered as a sale or as a payment of royalty, but since that was not an engineering question I paid no attention to it.

I went to Seattle, spent several weeks there, principally for the purpose of trying to determine the adverse effect, if any, on the value of this trade in 1913 because of the probability of prohibition, state-wide prohibition becoming effective.

I interviewed a large number of persons, both wet and dry, and professional men and others who were not emphatically either way, trying to form what might be termed a Gallup poll of the matter. I found quite a difference of opinion between different individuals who were there in '13 and who were acquainted with conditions, as to the probability of state-wide prohibition.

(Testimony of James M. Clack.)

It seems strange to me the drys were hopeful but not very optimistic, the wets, the breweries, were rather more cheerful, apparently. As I say, there was a wide difference of opinion, but I think without any question——

Mr. Mackay (Interposing): Well, now just a moment! He is stating the conclusions at the present time, Mr. Neblett, or is it still on the question of what he did [549] investigating?

Mr. Neblett: I am asking him what he did with respect to the investigation of conditions as of March 1, 1913.

Mr. Mackay: I object to it as hearsay testimony.

Mr. Neblett: It is not hearsay. He is an expert.

May the witness continue, your Honor?

The Court: Well, the witness was about to express an opinion.

Mr. Neblett: Yes, your Honor.

Well, you just go ahead with what you did up there.

The Witness: Well, I interviewed a large number of people both ways and——

The Court (Interposing): You mean you interviewed people who were living in Seattle in 1913?

The Witness: Right, yes ma'am; yes, your Honor, not only in Seattle, but in a few cities outside in the State of Washington, interviewed people who were living in the State of Washington in 1913 and who expressed to me their views, what their

(Testimony of James M. Clack.)

views were at that time as to the probability of state-wide prohibition becoming effective within a few years after that time.

I also investigated the question of the sale value of the trade name Rainier, the exclusive right to manufacture and sell alcoholic liquors, beer and malt liquors under the [550] trade name Rainier.

In that connection, your Honor, I found the year book of the United States Brewers Association for the year 1913 showed that there were 33 breweries operating in Washington; total number of barrels of beer produced in 1912 was 846,995. Of that number the Seattle Brewing and Malting Company, the data of the Seattle Brewing and Malting Company now shows that that company produced 309,810 barrels which would apparently indicate that the other 32 breweries produced a total of only 537,185 barrels, or an average per brewery of about 16,800 barrels, indicating that the other 32 breweries were of small capacity.

And I think there can be no question that the only willing buyer of this trade name would have been some other brewery operating in Washington.

Mr. Mackay. Well,——

Mr. Neblett (Interposing): Have you got an objection, Mr. Mackay?

Mr. Mackay: I just wondered if it is through his investigation.

Mr. Neblett: That is what he is supposed to be talking about, giving his investigation.

(Testimony of James M. Clack.)

By Mr. Neblett:

Q. Mr. Clack, did you talk to any brewers up there in Seattle? [551] A. Yes, sir.

Q. When you made your investigation?

A. Yes, sir.

Q. What did some of these men tell you about the situation?

Mr. Mackay: I object to that unless he specifies whom.

By Mr. Neblett:

Q. Well, who were some of the brewers that you talked to, Mr. Clack?

A. Well, I talked to Mr. Sick for one, of course, naturally, because he was the other interested party.

Q. Who was Mr. Sick?

A. A number of the others whom I talked to gave me the information confidentially and requested that their names be not made public.

Q. Well, now, did Mr. Sick ask you not to make his name public? A. No.

Q. Well, relate the conversation you had with Mr. Sick.

A. Well, in what respect? I didn't inquire of Mr. Sick at all as to the 1913 value.

Q. Yes.

A. My recollection is that Mr. Sick was not in Seattle [552] in 1913, although I am not sure of that.

Q. Yes.

A. Mr. Sick did inform me of several other men who were in the brewing business, older men whom I could interview.

(Testimony of James M. Clack.)

Q. Did you go and interview them?

A. Yes, sir.

Q. And did you get any opinion from them or any data that went into the formation of your opinion in this case?

A. I got opinions, definite opinions.

Q. From various——

A. (Interposing): Men who were engaged in the brewing business, or who were connected directly with the brewery business or the saloon business in Seattle in 1913.

Q. Do you recall, Mr. Clack, how long you were engaged in making your investigation?

A. Not exactly; two or three weeks up there altogether. I was on some other work also while I was there, another case. But my recollection is about—I put in about three weeks work on this particular work altogether, looking up the records of the laws that had been passed, and looking over old newspaper files, and anything that I could think of that would pertain to this matter.

Q. Now, Mr. Clack, did you form an opinion of value, of the fair market value of the right or trade name Rainier as of March 1, 1913, in the State of Washington and Territory [553] of Alaska? A. I did

Q. And now will you state to the Court the factors which you took into consideration and the assumptions that you made as the basis for your opinion of value?

A. The Seattle Brewing and Malting Company

(Testimony of James M. Clack.)

in 1913 had an investment in its plant of about $3,000,000. I could see no basis for assuming that they would sell their right, this trade name, and quit business.

The Court: Are you telling me about the plant in Seattle?

The Witness: In Seattle, yes. I think, if I may, at this time call attention to the difference in the commissions in 1913 and 1940 in the matter of production. In 1913 the Seattle Brewing and Malting Company had a plant in Seattle. Its production in the State of Washington was 171,902 barrels. In 1912, and outside the State of Washington 137,908 barrels.

In 1935 the Rainier Brewing Company brewery was located in the City of San Francisco. In 1936 its production outside the State of Washington was 290,788 barrels while their production of Rainier beer in Washington was only 74,091 barrels.

What I wished to emphasize is that in 1913 the Seattle Brewing Company was located in Seattle, and to have sold that name would—it would have sold what had constituted the bulk of its business.

In 1940 the Rainier Brewing Company could part with its Washington business without very greatly affecting its business as a whole.

In 1940 Mr. Sick had built and was operating a brewery in Seattle. He had his competitors, the other breweries of the state and the Rainier beer. The agreement he entered into not only gave him the exclusive right to manufacture and sell beer

(Testimony of James M. Clack.)

under the name Rainier beer but it also agreed that Rainier would not compete with him through the sale of any other—in any way through the sale of any other kind of beer.

I think that the price paid for the elimination of competition was fully as much as the price paid for the use of the name. That, of course, is an opinion.

By Mr. Neblett:

Q. Yes.

A. Getting back to 1913, I attempted to estimate what a willing buyer, might, or what a prospective buyer might have been willing to pay for this right on the following basis: The average investment of the Seattle Brewing and Malting Company in tangibles from 1908 to 1912, the average, including accounts receivable, this item which has been discussed, was $3,049,000. A 9 per cent return on that amount would be $274,000 annually.

The data presented by the taxpayer shows the average [555] income during those years at $383,000; $383,018.90.

If from that amount we deduct a return on tangibles we have left $108,581 excess earnings which might be attributed to intangibles. Of that amount, although the sales of beer by Seattle Brewing Company in 1913 outside the state were very nearly as great as those inside, the profit from the sales within the state was much greater. 80 per cent, about, of that profit, as I think it has been testified, was at-

(Testimony of James M. Clack.)

tributable to sales within the State of Washington. So that of this $108,000, if 80 per cent of that is considered as attributable to the sales within the State of Washington you would have a figure of $86,865. Of the barrels of beer sold by the Seattle Brewing Company during the years 1908 to 1912, the average was 159,415 barrels annually, which would show a profit per barrel apparently above the cost of manufacture and above a return on intangibles of 51 cents a barrel.

Now, if we may assume that in 1913 Seattle Brewing and Malting Company for some reason had decided to discontinue the use of the name Rainier and to dispose of it, to abandon it, or sell it, and some other brewer, a prospective buyer who was in a position to manufacture beer at no greater cost than Seattle Brewing and Malting Company had, could anticipate a profit of 51 cents a barrel on his sales.

The Seattle Brewing and Malting Company was an old and well established concern with an active sales organization, [556] and without question with considerable control over a large number of the saloons. I think that a prospective buyer—I think the Seattle Brewing and Malting Company, if it had sold the name Rainier and placed another brand on the market, could have retained at least 50 per cent of its former trade, that the purchaser of the name Rainier beer would not have been able, because of the name alone, to hold more than 50 per cent of that business.

(Testimony of James M. Clack.)

He could have, on that basis, anticipated annual sales of about 85,000 barrels, one-half of 169,000. And if he could have manufactured and sold that beer at no greater cost than Seattle Brewing and Malting Company he could have shown a return, an annual return on the name of $43,200.

If the prospective buyer of the right to use the name had not given any greater effect to the possibility—not given too much effect to the possibility of statewide prohibition becoming effective he might capitalize that at 16 2/3 per cent, which would indicate a value of $259,200.

By Mr. Neblett:

Q. As of what date?

A. As of March 1, '13, which, in my opinion, is the amount which a willing buyer might at that time have felt justified in paying for this right, the exclusive right and perpetual right to manufacture and sell beer in the State of Washington under the name Rainier, assuming that the Seattle [557] Brewing and Malting Company was to continue in business, and put another brand of beer on the market, and that he would have to compete with them.

Q. Does your evaluation cover the State of Washington and the Territory of Alaska, Mr. Clack?

A. Well, I have taken the data of sales from the data presented by the taxpayer, whatever they have. I made no change in those.

Mr. Neblett: Yes, that is all the direct examination, your Honor.

(Testimony of James M. Clack.)

Cross Examination

By Mr. Mackay:

Q. Mr. Clack, what value did you say?

A. Final figures?

Q. Yes. A. $259,200.

Q. You knew that the Commissioner of Internal Revenue had made a computed value in 1918 of something like four hundred, didn't you?

A. I think that is it.

Q. Yes. Now, Mr. Clack, you went to Washington, didn't you, in about 1942, the summer of 1942?

A. Of '22?

Q. '42? A. '42 to Washington. [558]

Q. Yes.

A. Oh, to the State of Washington?

Q. Yes, to the State of Washington?

A. Yes, sir.

Q. And you went up there principally to—I understood you to say you went up there principally to investigate the adverse conditions with respect to prohibition? That is the principal reason you went, wasn't it? A. Yes, sir.

Q. You wanted to make sure you could find out everything that you could that may be adverse to establishing a pretty good value, didn't you?

A. Yes, sir.

Q. Mr. Clack, when you were up there I think you stated that you saw Mr. Sick, didn't you?

A. Yes, sir.

(Testimony of James M. Clack.)

Mr. Neblett: Speak up a little, Mr. Clack, so we can get it.

The Witness: Yes.

By Mr. Mackay:

Q. Mr. Sick, you knew to be the President of the then Seattle Brewing and Malting Company?

A. Yes, sir.

Q. And you knew at that time that he had this contract, I mean that they had purchased—I withdraw that. [559]

You knew that he was a party to the contract in April, 1935, didn't you? A. Yes, sir.

Q. At that time you also knew that Mr. Sick had a tax case before the Tax Court, didn't you?

A. I am not sure that it had yet come before the Tax Court.

Q. Well, all right, the Bureau of Internal Revenue was considering it?

A. May I say that Mr. Sick discussed with me the question of whether or not I would take up for him with the Seattle office a settlement of his case.

Q. Yes. And Mr. Sick, didn't he tell you that he was willing to concede that at least part of the amount that he gave was in consideration for the acquisition of goodwill? A. He did.

Q. He did, didn't he?

A. Mr. Sick told me that he would be willing to settle the case on the basis that part of it was goodwill and part of it was advance royalty.

Q. Yes. And at that time you knew that Mr.

(Testimony of James M. Clack.)

Sick—there had been considerable ill feeling between the Sick crowd and the Rainier Brewing Company?

A. Mr. Sick had informed me of that fact.

Q. Yes. [560]

A. I don't think I knew it before.

Q. But he took pretty good pains to tell you, didn't he? He didn't hold anything back?

A. No, I think not.

Q. Mr. Sick at that time was operating the biggest brewery in the State of Washington, wasn't he?

A. Well, I am not sure. I think he was; I think his brewery was——

Q. (Interposing): Oh, you did? A. Yes.

Q. Well, he was still, his brewery was still manufacturing, and they were selling Rainier at that time, weren't they, in '42? A. Mr. Sick?

Q. Yes. A. Oh, yes.

Q. And that was the largest brewery in Seattle, wasn't it?

A. Mr. Sick's brewery was the largest in Seattle in 1942?

Q. In 1942?

A. Oh, yes, in Seattle, yes; I am quite sure.

Q. Didn't Mr. Sick also tell you that the value of the trade name Rainier on March 1, 1913 was very low?

A. I have no recollection of that fact. [561]

Q. But you wouldn't deny that he said it?

A. No. Mr. Sick—may I say Mr. Sick informed me that, in his opinion, the value of the trade name

(Testimony of James M. Clack.)

in 1935 when he made this contract was not nearly as great as it was in 1940 when he made the payment, that he had increased its value substantially by his own efforts.

Q. And didn't he tell you that the entire good value of the trade name was built up between 1935 and 1940? A. Not the entire value, no.

Q. But he gave you that impression, didn't he, that most of it had been?

A That he was responsible for building up a large part of the value in 1940.

Q. That, Mr. Clack, influenced you somewhat, didn't it, in trying to arrive at a fair market value here? A. In 1913?

Q. Yes. A. Well, I tried to keep from it.

Q. I know, but you considered it a little, didn't you?

A. Mr. Sick informed me that he would not in 1945 have paid $1,000,000.

Q. I know, but I didn't ask you that.

A. Pardon me.

Q. I asked you did that influence you a little?

A. Possibly.

Q. Be perfectly fair.

A. Possibly, it may have.

Q. Before you went up there you had been pretty familiar with the terms of that contract; were you not, Mr. Clack? A. I think so.

Q. When Mr. Sick told you, or tried to take claim for building up the goodwill to $1,000,000 in 1940, and it had little value in 1913, you didn't call

(Testimony of James M. Clack.)

attention to the provisions of the contract, did you?

A. I have no recollection of having done so.

Q. No, you didn't go to the trouble of calling his attention to a clause in the contract where it says: "Whereas, Rainier and its predecessors in interest have for many years sold and marketed products in the State of Washington and in the Territory of Alaska under the trade name brands 'Rainier' and 'Tacoma,' and said names and brands are well and favorably known in the State of Washington and Territory of Alaska?" A. No.

Q. Mr. Clack, you have been in the Government service a long time, haven't you?

A. It seems like a long time.

Q. Yes. I think you have done a pretty good service. But tell me why, if you were going to try to determine a [563] reasonable value for tax purposes of a matter, you would go to a man who was the opponent, say, a friendly enemy, or an enemy of the taxpayer?

A. Pardon me, Mr. Mackay, but I am quite certain that Mr. Sick expressed to me no opinion whatever as to the March 1, '13 value of this trade name. I did not ask him his opinion.

Q. Well,——

A. (Interposing): I didn't think he was qualified to pass upon it.

Q. Well, whose opinion did you get in Seattle, or whose opinion influenced you in arriving at your value?

A. As I said, I interviewed a number of people

(Testimony of James M. Clack.)

in different walks of life who were in Seattle in 1913.

Q. What other brewery man in Seattle did you talk to at that time?

A. As I have told you, the most of the information given me was confidential.

Q. I see. Most of your talks were with Mr. Sick?

A. Just a minute! Most of the brewers, naturally.

Q. You talked to Sick and his whole organization, didn't you, including Mr. Allen?

A. Not his whole organization.

Q. Well, I shouldn't say that. Mr. Allen?

A. I talked—the principal purpose for interviewing [564] Mr. Sick and other members of his organization was to try to find out the records of the old company at the Georgetown plant, what had become of them. I wanted to examine those records but was unable to find them.

Q. But you didn't talk to Mr. Sick about the conditions in Washington in 1913?

A. I think not.

Q. Not at all? A. Not at all.

Q. Wasn't Mr. Sick—he had been in the brewery business up there a long time, hadn't he?

A. I think not.

Q. You didn't even inquire whether he had been?

A. He may have. I really don't remember. I don't remember.

(Testimony of James M. Clack.)

Q. When you go to get information to impose a tax upon a taxpayer don't you get the background of the man whom you discuss that with to find out whether you get information that is worth anything? A. Right!

Q. And you made no investigation of Mr. Sick?

A. I think I made sufficient investigation of Mr. Sick to reach the opinion that he was not qualified to pass upon the March 1, 1913, value.

Q. I admit he isn't qualified to pass upon that. [565] Now, Mr. Clack,——

A. (Interposing): May I——

The Court (Interposing): You are all finished.

The Witness: Oh, all right!

By Mr. Mackay:

Q. Mr. Clack, did I understand correctly that, in your opinion as an expert, that it was possible in 1940 to sell the trade name Rainier but it was impossible in 1913? A. No, sir.

Q. What did you mean when you said that?

A. I didn't intend to say that.

Q. Well, what did you say?

A. I may have said that it was my opinion that it would have been impossible in 1913 to have sold this trade name for $1,000,000.

Q. Well, would it have been impossible, in your opinion, to have sold the trade name in 1913 at some figure?

A. I have said $259,000, that it is my opinion it might have been sold for.

(Testimony of James M. Clack.)

Q. Could the trade name at that time, in your opinion, have been sold by itself?

A. Yes, in my opinion, yes.

Q. Yes. Mr. Clack, did you investigate how much money had been spent on advertising and building up the trade name Rainier by the Seattle Brewing and Malting Company from 1893 [566] to 1913?

A. I did not. I thought the earnings——

Q. (Interposing): You weren't interested in finding how much money had been spent?

A. I thought the earnings were the best evidence.

Q. I agree with you, they are.

Did you ascertain whether or not the Seattle Brewing and Malting Company had received any medals for outstanding quality beer?

A. I did not.

Q. You weren't concerned with that? You didn't try to find out how it stood with relation to other brands in there so far as quality was concerned, did you? A. No.

Q. That is right. Now, Mr. Clack, you say that you took the earnings of this company and that you based your value upon the earnings. I think you will agree with me that—well, the evidence shows, I think you stated, that the average earnings for the five years ending June 30, 1912, were $383,000, approximately? A. Yes.

Q. And that was for the whole company, wasn't it? A. Yes, sir.

(Testimony of James M. Clack.)

Q. And I think you have stated that 80 per cent of those were attributable to Washington? [567]

A. That is, I have accepted the data furnished on the question.

Q. Yes, and that, of course, was the cream of the business, that is, where they sold retail, wasn't it? A. Right!

Q. And an average income of $383,000 is quite a figure, isn't it? A. Yes, sir.

Q. Would that indicate to you, Mr. Clack, that there must have been quite a demand for the product? A. Yes, sir.

Q. There must have been quite a demand, mustn't there? A. Yes, sir.

Q. And the profits were made, in your opinion, because of the demand, weren't they?

A. Undoubtedly!

Q. You couldn't make those sales unless there had been the demand? A. No.

Q. Now, the demand was there because there had been a lot of advertising, the name "Rainier" meant an awful lot to people in the State of Washington, didn't it?

A. Undoubtedly means—has a value, the name alone had a value at that time. [568]

Q. Yes, it is that famous mountain, isn't it?

A. Right!

Q. And did you look to see whether the labels on all of Rainier carried the picture of Mt. Rainier on it? A. I think I did. I remember that.

(Testimony of James M. Clack.)

Q. And the Washingtonians take great pride in that mountain, don't they?

A. Some of them preferred Tacoma, I believe.

Q. Yes, but anyway they take great pride in Rainier, don't they? A. Yes.

The Court: They are the two names given for the same mountain, is that correct?

The Witness: Yes.

By Mr. Mackay:

Q. Mr. Clack, isn't it possible, or, in your opinion, if Anheuser Busch in 1913 had wanted to come into the liquor business, I mean into the beer business in the State of Washington and in the Territory of Alaska, and they had had sufficient money to buy a brewery, that they would have been willing to pay more than $275,000 for the trade name Rainier?

A. I doubt whether they would have purchased it at all, or not, and used it. I think they were too proud of their own name.

Q. Well, let's take some other big company. Let's [569] take Pabst. That isn't so good, is it?

A. Just the same situation.

Q. Yes, you never made a comparison, did you, Mr. Clack, of the amount of Pabst beer sold in Washington compared with the Rainier beer, did you? A. No, sir.

Q. You didn't do that? A. No.

Q. Why? A. For what purpose?

Q. Well, to find out whether or not there was any public demand for the product, I mean for the

(Testimony of James M. Clack.)

product which was sold under the name Rainier? You don't think that is important?

A. I still think the best evidence is the income derived from the sale of Rainier beer.

Q. Now, Mr. Clack, what did you give for your intangibles, the earnings on intangibles?

A. You mean the percentage?

Q. No, I withdraw that. I think you gave a figure—did I understand you to say that you figured a net investment for those five years of $3,049,000?

A. I did.

Q. And you included in there, I think, accounts receivable, didn't you? [570]

A. I did.

Q. Mr. Clack, have you ever conducted any negotiations for the sale of any business?

A. No, sir, not that I remember.

Q. Well, you know, as a matter of fact, that if someone is coming to buy a business that you ordinarily don't sell your accounts receivable, don't you?

A. I know, as a matter of fact, that if a corporation is conducting a business it must have a substantial investment in that to take care of accounts receivable.

Q. Yes.

A. And that that is part of its investment.

Q. Well, then, let me put it this way: You have been through a lot of records and have examined a lot of re-organizations and everything else. Let me put it this way, to be perfectly fair: Isn't it a fact

(Testimony of James M. Clack.)

that a purchaser buying a business like a brewery business and a trade name is not at all concerned with accounts receivable, or just investments in stocks and bonds? They are the equivalent of cash?

A. I think that a purchaser of this right who is going to operate a brewery would have to have had a substantial investment to take care of accounts receivable.

Q. You are not answering my question.

A. Pardon me.

Q. Now, suppose that this hypothetical person had all [571] the investments he wanted, he didn't want the stocks and bonds that the seller had because he considered them cats and dogs, or, maybe, he didn't.

A. I didn't include stocks and——

Q. Wait a minute, please!

A. Pardon me.

Q. And assume that it had all the accounts receivable it wanted, and it didn't want to take over the accounts receivable of the seller, don't you think that that kind of a buyer would have purchased the business, trade name of Rainier, without taking these investments?

A. I didn't think we were discussing the fair market value of the plant. This is only the trade name.

(Testimony of James M. Clack.)

Q. Well, I am just trying to test your ability, I mean your expertness here. I will come to that later.

Will you answer the question?

The Witness: May I ask you to repeat it?

Mr. Mackay: Please read it.

The Court: Recess for a few minutes.

(Short recess.)

The Court: Will you read back the last question?

(The question referred to was read by the reporter.)

A. I think a purchaser of the trade name—I am not assuming that a purchaser of the trade name would have purchased the investments or these accounts receivable. [572]

By Mr. Mackay:

Q. I see. A. I am not.

Q. Now, I think that you said the average earnings, five-year earnings were $383,000?

A. Right.

Q. And what was your average investment?

A. $3,049,000.

Q. Is that the average investment?

A. Including the bills receivable, or accounts receivable, but not stocks and bonds.

Q. Now, how did you get that three million figure you just gave me? A. $3,049,000?

Q. Yes.

A. From the schedules; your schedule.

(Testimony of James M. Clack.)

Q. Well, does that represent the average for the five years? A. Right.

Q. Are you sure?

A. Unless I made some mistake in computation, yes.

Q. Didn't you use the actual investment as of June 31, 1912?

A. No, sir. It is intended to represent the average investment for the five years, including the accounts receivable, which run about $500,000, as I remember. [573]

Q. Then you get a total average investment of what? A. $3,049,000.

Q. $3,000.000——

A. Pardon me, Mr. Mackay. I think, if I may explain, I think you have used a figure in here of $2,500,000, about, I believe, as the average investment.

Q. Yes.

A. The only difference between us is that that doesn't include the accounts receivable and my figure does.

Q. Oh. Oh, I see. So put your accounts receivable in there? A. Right.

Q. Do you mean the bills receivable?

A. Well, bills receivable, the item of $500,000, approximately. May I explain?

Q. Yes.

A. In my opinion, the amount that a prospective purchaser would have paid for this trade name would be based upon the income that he could—the

(Testimony of James M. Clack.)

profit that he could make from it in the future above the cost of manufacture and above a return on the investment that he might need in order to carry on the business.

Now, I have assumed that a prospective purchaser could manufacture the beer at the same cost that Seattle Brewing and Malting Company did, which required including bills [574] receivable, required an average investment of $3,049,000.

Q. Well, now, let's just talk in round numbers.

The Court: Are you finished?

The Witness: Yes.

Mr. Mackay: I am sorry.

The Court: Are you finished?

The Witness: Yes.

The Court: Go on.

By Mr. Mackay:

Q. Assume that the average investment was $3,000,000 and you had average earnings of $383,000, what per cent return is that upon your investment? It would be over 20 per cent, wouldn't it?

A. Well, 10 per cent of $3,000,000 would be $300,000, would it not? 20 per cent would be $600,000.

Q. Well, it would be 12 per cent?

A. Approximately 12 per cent on total return, right?

Q. Now, tell me again what you consider to be tangible assets upon which you applied the 9 per cent return?

(Testimony of James M. Clack.)

A. Well, if I may, it is the average investment shown by your schedules for these five years, plus the item—is it bills receivable?

Mr. Neblett: I think that is Exhibit 23.

The Witness: Average, about $500,000, as I remember it, for the period. [575]

Mr. Neblett: Mr. Clack, I hand you Exhibits 13 and 24, and I think this will give you the information.

The Witness: (Examining documents) This statement, Exhibit 24, shows the net tangible assets value as above for the different years.

By Mr. Mackay:

Q. Well, can you give the average? We don't want to go over all those.

A. Well, I know, but I am pretty sure that is the figure which you use as an average, of $2,500,000.

Q. I will withdraw that question.

Let me ask you this: If you eliminate the bills receivable as part of the intangible assets what average in net investment would you obtain?

A. About $2,500,000.

Q. And that is the figure that Forbes gets?

A. Right.

Q. Now, let's assume that with a $2,500,000 investment in tangible assets, and with an assured income of $383,000, how much could a willing buyer pay and make a fair return on his money?

A. Shall I take time to make that computation? It will not take very long.

Q. It shouldn't take long to make that.

(Testimony of James M. Clack.)

A. No. A 9 per cent return, I think, on the two million [576] five would be two hundred and twenty-five thousand a year.

Q. Yes.

A. From the $383,000 it would leave $178,000 apparently.

Q. Well, now, where do you get your 9 per cent return on tangibles? How do you justify that?

A. That gives some consideration to, in my opinion, the hazards of the business.

Q. I see. Now, you have got, then, $175,000 attributable to good will, haven't you?

A. Yes, right.

Q. And what do you think that ought to be capitalized at?

A. Pardon me. That is the total?

Q. Yes.

A. About 80 per cent of that.

Q. No, no, I am talking now of just that alone.

A. The total? Do you want me to express an opinion as to the value of the good will of this company, which is not an issue?

Q. No, I merely asked you—you told me now that you allowed 9 per cent.

A. On the tangibles.

Q. On the tangibles, and that there was $75,000 applicable to intangibles. [577] Now, how would you determine the value of the intangibles?

A. On the basis of the facts, to multiply about

(Testimony of James M. Clack.)

20 per cent to that, in 1913, to the entire good will.

Q. 20 per cent?

A. Not less than that.

Q. And that would be, then, just five times 175, wouldn't it? A. Right.

Q. That would be an 875,000 value then, wouldn't it? A. Apparently.

Q. Now, if you applied a 16 2/3—now, if you capitalized them at 16 2/3 what would you get?

A. Well, Mr. Mackay, if you——

Q. (Interposing) You would multiply that by 6, wouldn't you? A. Yes, sir.

Q. And that would give you something over a million dollars, wouldn't it? A. Yes, sir.

Q. That would give you $1,088,000, wouldn't it?

A. Yes, sir, approximately.

Q. I mean $1,088,000. A. Yes.

Q. Approximately? [578] A. Yes, sir.

Q. Well, didn't I understand you to say that you should capitalize the 16 2/3 per cent?

A. I did.

Q. Yes.

A. Well, pardon me now just a moment. Let me see if I am doing this—80 per cent of that applies to the State of Washington.

Q. Yes. A. $800,000 is left.

Now, a purchaser of the right could not acquire over 50 per cent of that.

Q. Oh, that is the reason.

A. That is the reason.

(Testimony of James M. Clack.)

Q. Then if a buy in 1913 would have been willing to take just the brewery business——

A. The entire plant?

Q. Yes, and without these investments and the trade name, there would have been a very substantial value, wouldn't there?

A. If a buyer of the entire property in 1913——

Q. Yes.

A. If the issue were the value of the entire property, the plant, the total good will, including in it the Orient and South America and a dozen states in the United States, [579] and everything, the good will would have—the property would have a substantial value.

Q. Yes, and that would be around a million and four hundred thousand dollars, wouldn't it, based upon a 16 2/3 per cent capitalization?

A. Total value of the good will?

Q. Yes, I mean for the total amount?

A. I mean, approximately, yes, of approximately that.

Q. Yes. Well now, if the cream of the business was in the State of Washington and 80 per cent of the profits came from Washington why wouldn't the value be 80 per cent of the total?

A. The hazard.

Q. Can you answer that?

A. The hazard. The business was in the State of Washington. There was no great probability of prohibition taking place outside the State of Washington.

(Testimony of James M. Clack.)

Q. Oh, well now, we will put it this way: Assuming there was no probability of prohibition then the fair thing to have done would have been to take 80 per cent of your total, of $1,400,000 and say that was applicable to the State of Washington and Alaska, wouldn't it? I am assuming now that prohibition was not imminent.

A. You are valuing now the good will of the Seattle [580] Brewing and Malting Company——

Q. (Interposing) You understand——

A. (Interposing) And not——

The Court: (Interposing) Let the witness finish.

> "You are valuing now the good will of the Seattle Brewing and Malting Company and not what?"

The Witness: And not what a prospective buyer would acquire. I am valuating what I think a prospective purchaser, a willing buyer would be able to acquire.

By Mr. Mackay:

Q. Well now, let's be fair. I don't want to be unfair with you, Mr. Clack, at all.

Let me put it again. We have already assumed here that if you are putting value, based upon earnings, in the net investments, (we have talked about that) we would arrive at approximately $1,400,000 value of the goodwill for the whole amount.

Now, let's assume that prohibition was not imminent.

(Testimony of James M. Clack.)

The Court: He doesn't want to assume that.

The Witness: Why should I?

By Mr. Mackay:

Q. Oh. Well, if you don't want to assume it won't you please assume it just for me, just if you can? Please eliminate from your mind prohibition.

Now, in all fairness, then, wouldn't you take 80 [581] per cent of that value and allocate it to Washington and the Territory of Alaska?

A. Yes.

Q. Yes, that is right. A. Right.

Q. So then your big trouble, Mr. Clack, is that you are convinced, I think, that prohibition was such a hazard up there that there couldn't have been any value at all?

A. No. Pardon me, no. The other doubtful clause in my mind is the amount of business that the prospective buyer could hold.

Q. Oh.

A. There is no—pardon me—there is no question in my mind. I will agree that, disregarding the possibility of prohibition, that Seattle Brewing and Malting Company had a valuable plant and a valuable goodwill. It is when you consider the purchase of the trade name alone, the two adverse features, as I see it, of the possibility of prohibition and the amount of the business which a prospective buyer could—I see no reason for assuming that the Seattle Brewing and Malting Company would abandon its

(Testimony of James M. Clack.)

$3,000,000 plant to sell its trade name for $1,000,000 and just lose the rest of it.

Q. But, if somebody wanted to buy it maybe they would want to go out of business? [582]

A. Who?

Q. The Seattle Brewing and Malting Company. They may take their money for a physical plant and good name and just quit.

A. Well, pardon me, but I think that is an absurd assumption.

Q. Oh. Well, it wouldn't be the first time a buyer has been absurd.

Well now, Mr. Clack, I think you stated a while ago that you never made any investigation to determine the comparative value in the minds of the people of Washington of the various kinds of beer, and particularly Rainier.

Now, based upon that can't you assume that the demand was so great for Rainier that a purchaser of the trade name would have gotten the benefit of that public demand?

A. I was informed repeatedly by well informed brewers and saloon keepers that the income of the Seattle Brewing and Malting Company in 1913 was not nearly as much attributable to the name Rainier as it was to their organization and control of saloons.

Q. Oh. Well, who informed you that?

A. The different people that I interviewed.

Q. Tell me one, please. A. Not Mr. Sick.

(Testimony of James M. Clack.)

Q. Are you sure of that? [583] A. Yes.

Q. Are you, really?

A. Pardon me. May I explain this matter a little further, about Mr. Sick?

Q. O.K.

A. Several days ago I had to investigate the March 1, 1931 value of Santa Cruz Island, about 20 miles off the coast of Santa Barbara. It was sold to a man by the name of Mr. Stanton in Los Angeles. I went to Mr. Stanton and interviewed him as to his reason for purchasing the island in order to form some idea of a factor that might be given consideration in determining the value.

My personal purpose in interviewing Mr. Sick was to see what his views were as to whether he considered it a purchase or a license.

Q. Oh, you had to determine that first, didn't you?

A. I didn't have to determine that, no, but I included in my—I felt it part of my duty in my report to set out the facts.

Q. You are an engineer?

A. Yes, yes sir, I am presumed to be.

Q. And when you got this report you were an engineer. I understood you turned that over to somebody else because that was not in your province. So you go up to Washington to see Mr. Sick to determine whether or not it is a sale or a [584] royalty? A. No, sir.

Q. Now, Mr. Clack, do you know that in the State of Washington and the Northwest there are

(Testimony of James M. Clack.)

now no saloons? You know it is under State Liquor Control? A. Right.

Q. And you know that that has been that way ever since even before—I mean since the repeal of prohibition? A. You can still buy beer.

Q. Of course, you can buy beer, but you buy it in the grocery stores.

A. You can buy it over the bar.

Q. But they don't have saloons except controlled by the State?

A. Yes, I have been in the bar of the Olympic and bought a glass of beer several times.

Q. Did you make an investigation to determine whether or not a brewery now or since the repeal of prohibition could have any interest in a saloon?

A. I think not.

Q. No, you didn't?

The Court: What? Let's be clear about that. You say you think a brewery now couldn't?

The Witness: No. I said I made no investigation as to whether a brewery now can have any interest in a [585] saloon.

The Court: I see. You did not investigate that?

The Witness: At the present time.

By Mr. Mackay:

Q. You didn't investigate, or did you, to find out how much beer Century had sold, the new Seattle Brewing and Malting Company, since it got the name Rainier in the State of Washington?

A. Yes, I have a statement of their sales.

(Testimony of James M. Clack.)

Q. Now, you did not investigate whether or not the captive saloons in the period from 1935 to 1940 increased the sales of Century, did you?

A. I did not think any investigation was necessary on that question.

Q. Well, you considered captive saloons a very important part in your——

A. (Interposing) No, but they were there, and they were selling the beer, and the volume of sales spoke for themselves.

Q. Yes.

A. It showed that the sales increased very rapidly from 1935 to 1940 of Rainier beer in the State of Washington.

Q. How could you as a valuation expert come to the conclusion that it was the sale through a saloon or an institution where a brewery had some interest in it that was [586] responsible for the earnings without finding out the demand from the public for the beer being sold under that name?

A. I made no——

The Court: (Interposing) At what time?

Mr. Mackay: 1913.

The Witness: I made no determination——

By Mr. Mackay:

Q. (Interposing) Oh, I see.

A. (Continuing) ——to the amount of that.

Q. No, but you just considered that one of the big factors that you couldn't?

A. One of the uncertain factors.

(Testimony of James M. Clack.)

Q. That is just a guess, isn't it?

A. I beg your pardon?

Q. That was just a guess, wasn't it, on your part?

A. I knew it was there but I didn't know how much.

Q. You knew it was there but you didn't investigate to find out for sure. And isn't is a fact you went to see Mr. Scruby of the Bank?

A. What bank?

Q. I don't know the bank. Did you see Mr. Scruby? A. I don't remember.

Q. He is the nephew of Mr. Hemrich?

A. I think so, yes.

Q. Yes, you saw him, didn't you? [587]

A. Yes, sir.

Q. And you saw him to determine whether or not the goodwill on March 1, 1913 had any value, didn't you? Isn't that a fact, Mr. Clack?

A. Probably, yes, I think so.

Q. And Mr. Scruby has been a clerk in a bank for 30 or 40 years, hasn't he?

A. I really don't know about that.

Q. You didn't find out? A. No. Why?

Q. Well, you weren't interested in finding out whether he was a competent man to give an opinion, were you? A. Yes, sir.

Q. Did you find out—well, I withdraw that.

You didn't even make the effort to determine whether he was a competent man to give you any opinion on values at all, did you?

(Testimony of James M. Clack.)

A. Frankly, I don't remember Mr. Scruby at all. I remember going to some bank and talking to some individual there who I was informed knew something about the matter.

Q. Maybe, if you don't remember—didn't he tell you something about a little fight he had with Mr. Hemrick, and that he didn't get any inheritance?

A. I think not. I have no recollection of it.

Q. You have no recollection of it? [588]

A. No. I think if he had I would have been able to disregard it.

Q. I think you stated you investigated several other professional men up there to help you in this task of determining the fair market value. Now, who were they?

A. Well, as I save said before, the information was confidential. I haven't their names here with me, and I can't name them from memory, the different individuals. There were quite a number of them.

Q. You were much concerned with prohibition, weren't you? I mean that influenced your judgment in determining values?

A. Well, you have heard my computation of the percentages.

Q. Yes.

A. Nine per cent return on tangibles and 16 2/3 per cent on intangibles.

Q. Well, did you come to those percentages——

A. (Interposing) Would you say that those were influenced very greatly by the probability of

(Testimony of James M. Clack.)

statewide prohibition? Those are percentages that I used. Your own witnesses have used the same percentages here.

Q. Well, now, you went up there to find out, as I understand, principally to find out what adverse effect the element of prohibition, the imminence of prohibition would [589] have upon the breweries at that particular time? I think you stated that.

A. Right. And I would like to say, Mr. Mackay, that, frankly, if the effect was an adverse effect as I found it, it was not as great as I expected to find it.

Q. Oh, you had preconceived notions before?

A. No.

Q. Well, now, let me ask you this: Did you make an investigation in Washington to determine whether breweries were expanding their plant equipment, plant and equipment? A. Yes.

Q. You did? A. Yes, I did.

Q. Did you find how much Seattle Brewing and Malting Company had expanded?

A. Yes, I had that information, I think, before I went up there.

Q. You don't think that as a reasonable man—I will put it this way: Do you think that a reasonable man who has been capable of building that business up from 1904 from $65,000 to $310,000 in 1913, paying two $1,000,000 stock dividends, reaching a point where we have earnings of $383,000, do you think that men of that caliber would fly in the face of a

(Testimony of James M. Clack.)

threat of prohibition and spend $400,000 in '13 and '14?

A. I think there is a very wide distinction between [590] spending $400,000——

Q. (Interposing) Can you answer that "Yes" or "No"?

The Court: Well, he is trying to answer.

Mr. Mackay: Oh, I am sorry.

The Court: Go ahead.

The Witness: I think there is a very wide distinction between spending $400,000 in addition to a plant and in making an investment of $1,000,000 in intangibles in buying a future right; a wide difference.

I think Seattle Brewing and Malting Company might have spent $400,000 in improving their plant and yet have refused to spend $400,000 to acquire a trade name from anyone.

Q. Well, but they didn't need a trade name, they had a trade name that built them up $383,000.

A. I am sorry, I can't assume they had any—we are having to make a number of assumptions.

Q. Well, the values that you get, based upon all these earnings, were attributable to the trade name, weren't they? A. No.

Q. They weren't? A. No; goodwill.

Q. You never checked up the advertisements to see how it is advertised? Rainier? A. No.

Q. Wasn't Rainier the one that was advertised all the [591] time to promote the product?

A. That is right.

(Testimony of James M. Clack.)

Q. Wouldn't that be the one that was producing the income? A. The name?

Q. Yes.

A. Not in my opinion, not in the face of an old organization. They could have sold practically the same without the use of "Rainier," or very nearly, without the use of the name, in my opinion.

Mr. Mackay: That is all.

Mr. Neblett: Just one or two questions, your Honor.

Redirect Examination

By Mr. Neblett:

Q. Mr. Clark, in your computation there a while ago I believe you multiplied $2,500,000 by 9, resulting in $225,000, which deducted from $383,000 would leave $158,000 instead of $178,000.

A. I made these computations rather hurriedly.

Q. Yes.

A. And they probably were incorrect.

Mr. Neblett: I wanted to correct the record in that respect, your Honor.

The Witness: You shouldn't have any difficulty [592] with that.

By Mr. Neblett:

Q. Will you check that and see if I am right? I don't want any error. I don't wish any inaccuracy in the record in that respect, Mr. Clack.

The Witness: That would give, would it not, 158,000?

(Testimony of James M. Clack.)

By Mr. Neblett:

Q. Yes, that is my calculation.

Mr. Clack, your conclusion, based on whether or not the figure was 158,000 or 178,000, would be altered in proportion, would it not?

A. Right.

Q. Now, Mr. Clack, I believe you stated the Bureau determined an intangible value as of March 1, 1913 for the Seattle Brewing and Malting Company of $406,680.20.

What was your statement in that respect?

A. I think that Mr. Mackay——

Q. (Interposing) Asked you that, did he?

A. Stated that, yes.

Q. Exactly. Now, I want to ask you what did that value include? Was that just for the name Rainier, or the goodwill value, or intangible value of Seattle Brewing and Malting Company as of March 1, 1913, we will say, for the whole world? [593]

A. My understanding is it was a value placed by the Bureau on the entire goodwill of the Seattle Brewing and Malting Company.

Q. As of March 1, 1913?

A. As of March 1, 1913.

Q. And not only fair market value as of March 1, 1913 of the trade name alone? A. No.

Q. Rainier? A. Right.

Q. Mr. Clack, just one more little question.

What did you conclude about the imminence of prohibition, or the possibility of prohibition in the

(Testimony of James M. Clack.)

State of Washington after you had completed your investigation?

A. I concluded that in 1913 there was at least a very definite and distinct possibility of statewide prohibition becoming effective within the next few years. I would like to add that there is no one, I think, could say just how definite that was, or exactly what effect should be given to it. It was there; it was recognized.

(Witness excused.)

Mr. Neblett: Your Honor, I have one exhibit that we wish to get in, which is an exhibit in the Seattle Brewing and Malting Company case, Docket No. 2265. This exhibit was Exhibit 16 in that case, and it is a schedule of [594] Rainier advertising, the name "Rainier" by Seattle Brewing and Malting Company.

The Court: You mean advertising costs?

Mr. Neblett: Yes, what they spent for advertising the name "Rainier."

Your Honor will recall——

The Court: (Interposing) Over what period?

Mr. Neblett: Over a period from '35 to '44. Your Honor will recall that the contract of April 23, 1935 contained a provision that Seattle Brewing and Malting Company would spend—keep up or spend certain amounts advertising the name Rainier.

Now, we want to show this advertising and the amounts spent on down to 1944 for the purpose of showing that Seattle Brewing and Malting Com-

pany is still performing under the contract of April 23, 1935, that that was an important part, and essential part of that contract.

The Court: A continuing obligation?

Mr. Neblett: And a continuing obligation. That is exactly the point.

The Court: Any objection?

Mr. Mackay: Well, if your Honor please——

Mr. Neblett: (Interposing) I think Mr. Mackay has a copy.

Mr. Mackay: I think whether the obligation is a [595] continuing one must be determined by the contract itself.

Mr. Neblett: That is right.

Mr. Mackay: And that an exhibit in the other case, even if it is advertising that they spent, won't help determine the question here. It is a legal question that counsel is trying to prove.

I object to the exhibit as being incompetent, irrelevant and immaterial. It takes into consideration matters not at all material to this case, particularly it goes into '43 and '42, years subsequent to the date here. We are not concerned with it at all. It could have absolutely no bearing on the contract. If you look at the contract your Honor can well see during the royalty time of the contract they weren't paying to advertise it.

The Court: Then, if the whole matter is dependent on the contract the schedule which is offered would be immaterial, wouldn't it?

Mr. Mackay: Yes, your Honor, quite.

The Court: Well, then, subject to the point that the contract is determinative of the question I will receive the schedule in evidence only to show that the Century Company expended some amounts for advertising.

Mr. Mackay: All right.

Mr. Neblett: It would also show the amounts in advertising, that a good part of its value could have been developed [596] after '35. For example, in 1935 it showed——

The Court: Oh, we are not going to go into that.

Mr. Neblett: Very well, your Honor, on the first ground is satisfactory to the Government.

Mr. Mackay: If your Honor please, if you get it in the record for one purpose it is in there for all. If that is the purpose at all, that can't possibly have any value here with respect to the value of that, whether we are building it up in that time. It is like the witness here who went to Seattle to see our enemy——

The Court (Interposing): The point is that the contract was made in 1935 and that the consideration was fixed in 1935.

How would they fix a consideration in 1935 in anticipation of the increment that would result in succeeding years for expending some money for advertising?

Mr. Neblett: I think your Honor's point is well taken, but I just want to show the amounts they spent, that is all.

The Court: The objection is sustained.

Mr. Neblett: Very well.

Mr. Mackay: Are you through?

Mr. Neblett: Yes, your Honor.

Mr. Mackay: If your Honor please, counsel quoted from an unsigned memorandum which is on the stationery of [597] John F. Forbes and Company, and dated October 15, 1942.

I have examined the statement, and I found out that counsel has read into the record only the parts that seem favorable, I mean favorable to the Commissioner, and I am not accusing him of anything, but I would like very much to offer the whole thing.

The Court: You want to offer the whole thing. The whole report is received now as Petitioner's Exhibit next in order which, I believe, is 41.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 41.)

[Petitioner's Exhibit No. 41 appears in Book of Exhibits.]

Mr. Neblett: I felt fairly certain, your Honor, that Mr. Mackay would read the balance of the document.

The Court: Oh, I would rather have the whole statement in the record and not excerpts from it, for myself.

Mr. Neblett: Yes.

Mr. Mackay: Now, if your Honor please, I think that counsel in his examination of Mr. Weber had referred to the Anti-Saloon League Book for the year 1914.

I should like to offer in evidence pages 84 and 85

which show the consumption of malt liquors and also the per capita consumption in the United States from 1840 to 1912.?

The Court: Why?

Mr. Mackay: Well, it shows——

The Court (Interposing): The whole United [598] States?

Mr. Mackay: Well, my purpose in offering that, your Honor, is that it shows the gradual climb from 1905 on.

The Court: Oh, I should think that would be immaterial.

Mr. Neblett: We think it is immaterial, your Honor, too remote and speculative.

The Court: In the whole United States?

Mr. Mackay: Well, I will confine it, if your Honor please. I have one here from the Department of Commerce, just from the State of Washington.

Mr. Neblett: Let me see that.

The Court: That is increase in per capita consumption in the State of Washington, is that right?

Mr. Mackay: No; that is just—wait a minute! (Examining document.) No, this is merely fermented liquors produced in the State of Washington.

The Court: Fermented liquors produced in the State of Washington?

Mr. Mackay: This is called "Fermented Liquors."

Well, never mind, your Honor. Withdraw it. We have more.

The Court: Is beer fermented liquor?

Off the record.

(Remarks off the record.) [599]

The Court: Is there anything further?

Mr. Mackay: No, your Honor.

The Court: Now, just before we go to the question of briefs I am going to have to ask you something about the contract, Exhibit 1.

Mr. Mackay, Rainier agreed to sell to Century all of the property described below, a tract of land known as the Julius Horton tract—", et cetera, et cetera, et cetera, "together with appurtenances thereunto belonging or appertaining," and "2500 half barrel beer containers," and a little bit of personal property consisting of some cardboard cases and some beer on hand, and some sales material, and some office fixtures and equipment.

Now, what did Rainier sell to Century? In the niceties of legal language sometimes really nothing can be ascertained.

Of course, I am aware of the fact that improvements become fixtures, and if you sell property no doubt you sell the fixtures attached thereto.

From this contract I really don't know what Rainier sold to Century under the first part of this agreement,—it is called a Purchase Agreement—the first part of this contract. What did Rainier sell to Century? What is supposed to be meant by that description? Did Rainier just sell to Century a piece of land? I don't think so. [600]

Mr. Mackay: No, your Honor.

The Court: If not, what did they sell to Century?

Mr. Mackay: It is my understanding Rainier at that time agreed to sell Century their brewery plant at Georgetown, Washington.

The Court: Well, now, is that anywhere stipulated by the parties? Do you have any stipulation like this, that under a contract dated April 23, 1935, petitioner, Rainier Brewing Company, sold to Century a beer brewing plant known as the Georgetown plant located in such and such a place?

Mr. Mackay: Well, if your Honor please, I think in the ninth paragraph of the pleadings it says: "Pursuant to the terms of said contract Rainier sold to Century its brewery located at Seattle, Washington, together with the beer on hand, and personal property situated in said brewery, and Rainier withdrew from the sale and distribution of its products in the State of Washington and Territory of Alaska."

That is Paragraph (i), your Honor.

The Court: And evidently a good part of your pleadings are admitted, is that correct?

Mr. Mackay: I want to say this: In the 25 years I have been practicing there has been more admissions in this case by the Commission than in any other case.

The Court: Yes. All right.

Now, Paragraph (i), then, is supposed to be your [601] description of what was sold under the first paragraph of this contract, which is Exhibit 1, is that correct?

Mr. Mackay: That is right, your Honor. That is admitted.

The Court: And was the brewery plant of Rainier located at Seattle?

Mr. Mackay: Mr. Goldie?

Mr. Goldie: No.

The Court: The only brewery plant of Rainier——

Mr. Goldie (Interposing): Georgetown.

The Court: What?

Mr. Goldie: Georgetown.

Mr. Mackay: It is Georgetown, Washington.

The Court: Well, this says "located at Seattle."

Mr. Goldie: Well, it is partly Seattle, but it is about 8 miles out of the City.

The Court: Well, then, the plant was located at Georgetown, Washington?

Mr. Goldie: Yes, part of Seattle.

The Court: Georgetown, Washington, which is about how many miles from——

Mr. Goldie: About 8 miles south of Seattle.

The Court: From Seattle. And how big a plant is that?

Have you been sworn in? [602]

Mr. Goldie: Yes.

The Court: Who is speaking, please?

Mr. Mackay: Mr. Goldie.

The Court: Mr. Goldie, how big was that plant?

Mr. Goldie: We had a frontage on the street there of 1400 feet.

The Court: Was that your——

Mr. Goldie (Interposing): Four blocks, practically.

The Court: Was that your main plant in the State of Washington?

Mr. Goldie: Yes, ma'am.

The Court: Did you have any other plants?

Mr. Goldie: Yes; years ago we had other plants.

The Court: No, at the time this contract was made?

Mr. Goldie: That is the only plant we had.

The Court: Is that the plant that was producing three hundred some odd thousand barrels of beer a year in 1935?

Mr. Goldie: Yes, your Honor.

The Court: Was that plant in existence on March 1, 1913?

Mr. Goldie: Yes, your Honor.

The Court: In exactly the same condition?

Mr. Goldie: Yes, your Honor. [603]

The Court: Is that true?

Mr. Goldie: Absolutely.

The Court: There have been no improvements in that plant?

Mr. Goldie: We kept improving every year, building on to it.

The Court: Your additions and improvements?

Mr. Goldie: As the business grew we kept building on to take care of all the additional business.

The Court: All right. Did that plant have the same productive capacity on March 1, 1913, that it had on April 23, 1935?

Mr. Goldie: Well, that was entirely a different plant. We were manufacturing in '35 down here.

The Court: Just answer my question.

Mr. Goldie: I couldn't answer that because this was entirely a new plant that we built in 1915. You see, there were two separate plants.

The Court: Well, no. We are not tracking together on this at all. You had a plant in Georgetown that you sold in 1935?

Mr. Goldie: That is right.

The Court: Now, just follow me carefully, please.

I asked you a few minutes ago if that plant was [604] there on March 1, 1913?

Mr. Goldie: Yes, your Honor.

The Court: It was?

Mr. Goldie: Yes, your Honor.

The Court: And I asked you if the productive capacity of the plant in 1913 was the same as it was in 1935?

Mr. Goldie: Well, that is hard to answer that question, your Honor, for the reason—if you will permit me to explain it?

The Court: Well, now, you don't know why I am asking this question so I have to ask you to just answer my question.

Mr. Goldie: Well, I can't very well for this reason: In 1915 when the State of Washington went dry that place closed up. We came down here and built a new plant.

The Court: All right, now, I am going to stick

at this. I am not talking about 1915 when your plant closed.

Mr. Goldie: Well, you are speaking of '13.

The Court: I am talking about 1913, which is this date we have to make a valuation on, and your plant was then in operation.

Mr. Goldie: That is right.

The Court: Were you acquainted with the plant then?

Mr. Goldie: I was. [605]

The Court: All right. Now please stick to my question.

Mr. Goldie: All right.

The Court: I don't care what happened in between——

Mr. Goldie (Interposing): I see.

The Court: So far as your description is concerned. You know what happened in between, but I am not going to ask you to go into an explanation. I am just going to ask you to give me a statement of fact.

Was the productive capacity of the Georgetown plant on March 1, 1913, exactly as it was on the 23rd day of April, 1935?

Mr. Goldie: I would say it was larger.

The Court: In 1935?

Mr. Goldie: In 1913.

The Court: You would say it was larger in 1913?

Mr. Goldie: Yes, ma'am, it was larger in 1913 than this new plant was in 1935.

The Court: You had a new plant there in 1935?

Mr. Goldie: In San Francisco.

The Court: In San Francisco?

Mr. Goldie: Yes, ma'am. We put that in in 1915.

The Court: Well, what plant did you sell to the Century Company in 1935?

Mr. Goldie: That plant up in Seattle. [606]

The Court: You didn't sell any plant in San Francisco, did you?

Mr. Goldie: No, ma'am, we still operated that plant in San Francisco.

The Court: Well, I didn't ask you anything about the productive capacity of the plant in San Francisco.

Why do you bring in San Francisco?

Mr. Goldie: Well, I thought that is what you asked me.

The Court: I asked you nothing of the kind. Please pay attention to my question.

Mr. Goldie: I will try to.

The Court: We will start in all over again.

You sold a plant on April 23, 1935, as I understand it, under this contract that is Exhibit 1.

Mr. Goldie: That is right.

The Court: And that plant was located in Georgetown? Mr. Goldie: That is right.

The Court: Now, I will have to begin all over again.

When did you build that plant?

Mr. Goldie: Well, they started to build that. I was not connected with the company, but I presume

somewhere around 1900, or probably before that. I couldn't answer that. [607] I remember this very well, though, when I first arrived in Seattle in 1900 the plant was pretty well up, not quite as big as it was at the end of 1913, but there was quite a large brewery there.

The Court: So that plant that you sold in 1935 was first constructed in 1900?

Mr. Goldie: Oh, around about that time.

The Court: And was on the site in 1913?

Mr. Goldie: Yes, ma'am; yes, ma'am!

The Court: And what was the productive capacity of that plant in 1913, leaving out of consideration, please, the productive capacity of any other plant owned by Rainier, and leaving out of consideration any shipments of beer into the State of Washington from any plant outside of the State of Washington?

What was the productive capacity of the plant in Washington just taken alone?

Mr. Goldie: I would say between three and four hundred thousand barrels per annum.

The Court: Between three and four hundred thousand barrels.

Now, was that the productive capacity of the plant in 1935?

Mr. Goldie: It could have been.

The Court: Was it? Was the productive capacity [608] of the plant in 1935 greater than 400,000 barrels?

Mr. Goldie: It was not operating at that time.

The Court: It was not operating in 1935?

Mr. Goldie: No, ma'am.

The Court: When was it closed down?

Mr. Goldie: It closed down on January 1, 1916.

The Court: Well, I didn't know that. The Washington plant had never been in operation?

Mr. Goldie: No, ma'am. No, ma'am. I might also explain, you asked counsel a minute ago about the sales made on those 2000 kegs and the beer on hand.

The Court: No, please don't go into anything else.

Mr. Goldie: Oh, all right!

The Court: Because you don't know what I have in mind, and I am trying to get something straightened out in my mind, and then you just confuse me and confuse the record.

Well, I didn't know that. Isn't this the first time that it has come out in this record that that plant at Georgeown had been an idle plant from 1915 when it was closed down, until 1935 when it was sold?

Mr. Mackay: I think that Mr. Neblett mentioned that in his opening statement. My understanding of the plant, after it was closed down, it wasn't making any beer, it was nevertheless used as a warehouse and storage plant for beer. [609]

The Court: Well, that is all right. That is beside the point. It was not being used to manufacture beer, is that correct?

Mr. Mackay: After 1916, is right.

The Court: After 1916?

Mr. Mackay: That is right, your Honor.

The Court: That is what the witness has been trying to tell me, then, that the plant was closed in 1916.

Mr. Goldie: That is right.

The Court: And thereafter all the beer that the Rainier Brewing Company sold in the State of Washington was beer that was manufactured in San Francisco?

Mr. Goldie: That is correct.

The Court: And shipped into the State of Washington, is that correct?

Mr. Goldie: That is correct.

Mr. Mackay: That is correct.

The Court: Well, that is the first time I knew that.

Now, I want to go to some other points in the contract.

Is the Century Brewery Company now operating that plant in Georgetown? Maybe Mr. Goldie ought to take the stand.

Mr. Mackay: He testified to that this morning, [610] your Honor.

Mr. Golden: They did not.

Mr. Mackay: They have never operated since.

Mr. Goldie: That was another brewery that Century was operating.

The Court: Why did they buy that plant?

Mr. Goldie: They bought it—that was part of the deal we made with them. It was rented partly to an ice manufacturing company during that period after prohibition.

The Court: An ice manufacturing——

Mr. Goldie (Interposing): To an ice manufacturing company, and we practically insisted that they buy that property from us and that is what——

The Court (Interposing): Would you mind taking the stand again, please?

Mr. Goldie: Yes.

JOSEPH GOLDIE,

recalled as a witness by and on behalf of the petitioner, having been previously duly sworn, was examined and testified further as follows:

The Court: When prohibition then came along in the State of Washington in 1914—isn't that the time?

The Witness: No. They voted it in '14, but the state closed in November. The election took place in November, 1914, and they gave them a year, a little over a year, to stay [611] in business, and then closed up on January 1, 1916.

The Court: When you closed on January 1, 1916, that was because of the enactment of the National Prohibition Law?

The Witness: That is right.

The Court: And did you then dismantle that plant?

The Witness: Yes, ma'am. We took out some of the equipment and moved it down to our new plant there.

The Court: I suppose that in the course of time

(Testimony of Joseph Goldie.)

you took out all of the equipment that you would use in beer manufacturing?

The Witness: Well, we took as much as we could use. We left all our refrigeration there, our ice machines and things of that kind.

The Court: Well, I mean whatever you use in the brewing of beer you brought down here?

The Witness: Some equipment that we could use, yes, ma'am.

The Court: That left the plant up there equipped only for refrigerating and storing purposes?

The Witness: That is correct.

The Court: Did you use it as a storehouse for beer?

The Witness: Yes, ma'am, we opened up—we had to have a place to do business in, so we used it for our [612] storage beer that we shipped into the State of Washington. We had our sales office there and kept our trucks there.

The Court: Now, let me ask you this: Were you a party to this contract?

The Witness: How?

The Court: Were you a party to this contract?

The Witness: Yes, ma'am.

The Court: Well, you weren't one of the signers? Mr. Hemrich signed it, and Mr. Specht.

The Witness: He was president at that time, that is right.

The Court: Mr. Specht isn't here, is he?

The Witness: No, he is not with us any more.

The Court: The intention of Rainier under this

(Testimony of Joseph Goldie.)

agreement, as I understand it, was to end the sale of its own beer in the State of Washington?

The Witness: And Alaska.

The Court: And Alaska.

The Witness: That is right.

The Court: Well, now, if it were going to end the sale of its own beer in Washington and Alaska it wouldn't have any need any longer for that refrigeration and storage space at Georgetown, would it?

The Witness: No, ma'am.

The Court: And is that the reason it wanted to [613] sell that Georgetown plant?

The Witness: Well, we had no intention of selling it until we were approached by the Century Brewing Company.

The Court: Will you just try and answer the questions I ask you?

Read the question, please.

(The question referred to was read by the reporter.)

The Court: In 1935 when you had decided to sell it, was that the reason you wanted to sell it?

The Witness: No, we did not decide to sell it. We had intended to go up there and open that brewery up. We were doing such an enormous business there that we wanted to rehabilitate the brewery. Then we were approached by these people to take over the sale of our beer on a royalty basis and then purchase at the end of five years.

(Testimony of Joseph Goldie.)

The Court: So that when you decided to let them take over the sale of your beer on a royalty basis, then you didn't want the refrigerating plant any more, did you?

The Witness: No, ma'am.

The Court: All right, have it your own way.

The art is to find out how to ask the question the way the witness wants you to ask the question.

Now, of course, that explanation of the first part of this contract is very helpful in understanding the [614] contract. I think that I will want to know, when I take this case up, what it was that Rainier Brewing Company sold under this contract, don't you see?

Mr. Mackay: Yes.

The Court: And, of course, I want to know what the heart of this contract is.

Mr. Mackay: That is right.

The Court: Now, obviously, the main thing sold under this contract was not the plant.

Mr. Mackay: No, that is correct.

The Court: Is there any question existing there between the parties as to what Rainier sold to Century under the part of this contract that is given the heading of "Licensing Agreement?"

I might say that I am asking these questions because we assume that an issue has been raised under the pleadings, and yet from the testimony that has been offered the court is asked to decide a very difficult question, and this court is inclined to be lazy.

Mr. Mackay: We don't believe it.

(Testimony of Joseph Goldie.)

The Court: I don't want to have to decide any question that I really don't have to decide. Furthermore, there is another case before the Tax Court that was heard before Judge Mellot, and, I think, if possible, that I want to be very sure about what the issue in this case is. [615]

Mr. Mackay: Yes.

The Court: Also, I am very realistic, as I think you know, and I think that these valuation questions are terriffically difficult because they involve so many assumptions, hypotheses, and unrealistic factors. And I think the right answer to the problem is going to be found by taking the most realistic approach. So I would start out by wanting to be very sure about what was sold under this contract, or licensed, or transferred, or bargained for, whatever we are going to call it.

There is a difference of opinion, evidently, between the parties to the contract, as to what the terms of this contract mean, is that true?

Mr. Mackay: Well, there has never been any difference, I think, between the parties.

The Court: Well, hasn't the other party to this contract reported income on a basis that would result from a different understanding of the terms of this contract?

Mr. Mackay: That is what I was going to say, the difference lies between the two contracting parties of the United States Government as to the interpretation, but as to the——

The Court (Interposing): No. Have you re-

(Testimony of Joseph Goldie.)

ported your income in a way that is consistent with the other party in the contract? [616]

Mr. Mackay: Yes, your Honor. We reported this as a sale. We claimed value equal to and in excess of the sales price, therefore, no gain.

The Court: How do the other parties treat this transaction?

Mr. Mackay: Well, I understand that——

The Court (Interposing): On its return? Did they treat this as a purchase of a trade name?

Mr. Mackay: Well, in their income tax return, which I haven't seen—I will just state it from hearsay—on reading the transcript it seemed to me they deducted the royalties up to—was it June, 1940?

Mr. Neblett: That is right.

Mr. Mackay: And claimed no more. And then they had a tax case in the Tax Court, and then in the Tax Court they claimed the right to deduct the greater amount, claiming then it was a royalty.

I think I am stating that correctly.

The Court: If they claimed their payments were royalties that would—if I understand it correctly, that would suggest to me that they interpreted this provision in the contract as meaning that they were purchasing a right, assuming an obligation to pay royalties, and that they were not purchasing a capital asset.

Mr. Mackay: As I said, at the time they filed [617] the return I think they just viewed it as a payment of the royalty, because there was six months royalty due, and then after they exercised

the option of course there were no further payments. Then I understand that after the Government had proposed additional taxes as an offset, they then claimed they were entitled to additional royalties. [618]

Mr. Neblett: The claimed a deduction for the million dollars in the Seattle case——

The Court (Interposing): On what theory?

Mr. Neblett: On the theory that this contract is a license, that they didn't purchase the right at all.

The Court: Then the parties are not in agreement so far as the tax purposes are concerned? The parties are not in agreement in their interpretation of this contract?

Mr. Mackay: You are quite right so far as taxes are concerned. That is what I say.

The Court: That is as good a reason for having to construe a contract as any.

Mr. Mackay: That is right.

The Court: For taxes you can construe a contract for purposes of breach of contract, and it is just as much of a problem to construe a contract for purposes of taxes as it is to construe a contract for purposes of breach of contract. So I would say that in this case the most important thing was to determine what this contract provided.

Mr. Mackay: That is right.

The Court: And at the end of three days of trial that has not been established, has it, or am I——

Mr. Mackay (Interposing): I would think it has.

The Court: Or am I failing to understand the problem? [619]

I point this out because of the difficulties we have been through for three days. I am not always wholeheartedly in sympathy with the work I have to do as a Judge of this Court, or the work, the technique the tax lawyers employ. This subject is a terribly difficult subject for taxpayers, for tax practitioners.

Mr. Mackay: It is.

The Court: And there ought to be better techniques employed. We shouldn't have had to spend three days going through the kind of speculative opinion, testimony, that we have gone through that has no exact technique involved. If the health and welfare of the world depended upon that kind of technique we would fail to survive.

Mr. Mackay: You are quite right.

The Court: We couldn't win a war if we were applying that kind of technique to practical problems, and this is a practical problem, and we don't have a good technique for solving it.

That is true? Isn't that true, I mean as individuals?

Mr. Mackay: There is much in what you say.

The Court: As individuals we would admit that. We might not want to admit that as counsel for the parties in the case, but I am in a position to take an objective view and that is my opinion of it.

Mr. Mackay: I am glad to get it. [620]

The Court: Now, we can't go on any longer. I wanted to tell you that I consider the most impor-

tant thing in approaching this problem a clear understanding of what the parties disposed of.

Mr. Mackay: That is quite right, your Honor.

The Court: Under this contract, and what kind of disposition was made.

Mr. Mackay: Yes.

The Court: And counsel for both parties submit that to the Court, I understand? The Court is to apply its best judgment as to whether there was a mere licensing agreement here, or a sale of the right to use a trade name, or a sale of the trade name itself. And assuming that the Court decides that there was the sale of a trade name, then the Court must determine whether the taxpayer realized any gain when payments were made in the taxable year. And, as I understand it, both parties take the view that from 1935 until 1940 the payments made were royalty payments?

Mr. Mackay: Yes.

The Court: But that in 1940 the time came to exercise what has been referred to as an option?

Mr. Mackay: Yes.

The Court: And that at that time one party says the option was to anticipate royalty payments; is that right?

Mr. Mackay: That is right. [621]

The Court: Is that your position?

Mr. Neblett: That is right.

The Court: Now, what do you think they did when they exercised this option?

Mr. Neblett: Well, we have taken two positions in it. We say in the Seattle case, your Honor, that

they purchased the trade name, and it was a capital transaction. That was the position we took before Judge Mellot.

The Court: And that they paid a consideration of $1,000,000 for the purchase of a trade name?

Mr. Neblett: And the other rights in that contract of April 23, 1935.

The Court: Well, there is where you get off the beam when you say "and those other rights."

Mr. Neblett: Yes.

The Court: Well, now, what position do you take in this case?

Mr. Neblett: We take the position in this case that in view of the rights that were reserved that this did not constitute a sale or a capital transaction, it constituted a mere license. In other words, we take an opposite position from what we took in the Seattle case.

The Court: Now, of course, the petitioner has understood that that is the attitude of the government?

Mr. Mackay: Yes, your Honor. [622]

The Court: And everyone is being patient about that. We are being good-natured in what we think may be an inconsistent position and that is fine. It is a good thing that citizens can have that patience. The thing that troubles me, though, is that you come before this division of the Tax Court, the petitioner knowing, Mr. Mackay, that the government is taking an inconsistent position, and knowing that we have a rule, a perfectly good rule in the Law of Contracts and in the law of construing contracts,

that we may look to the intent of the parties, petitioner does nothing to help the Court to answer this first primary problem.

Mr. Mackay: I might say, your Honor——

The Court (interposing): Other than to say "We think that the contract speaks for itself, and that within the four corners of the contract the terms make it perfectly clear that this was the sale of a trade name ,and that that was the main thing and the only thing covered by the contract, that the $1,000,000 was paid just for the sale of the trade name. Therefore, we think the issue now resolves itself under the terms of this contract." And we go forward for three days to introduce some testimony of eminent experts on the subject of valuation to show what the fair market value of this trade name was on March 1, 1913, assuming the hypothetical and unreal situation that there was a willing buyer and a willing seller who wanted to buy just the trade name [623] and nothing else.

Well, I just want to be sure that I am describing the situation to myself properly.

Mr. Mackay: Well, it is very helpful, your Honor. We are glad to get it.

The Court: Am I describing the situation to myself properly?

Mr. Mackay: Why, I think so, yes.

The Court: Am I doing my thinking out loud right?

Mr. Mackay: Well, I am glad to those outward thoughts, because, after all, it will help us to concentrate in the brief.

The Court: Well, it may help you to concentrate on a brief, but what I am trying to decide in the next five minutes is whether I will conclude the hearing in this case or whether I will continue it until Monday.

Mr. Neblett: Your Honor, could I say this in a brief statement——

The Court (interposing): Well, I would like to finish my thought because I have taken some time to voluntarily express it.

Mr. Neblett: Very well, your Honor, certainly.

The Court: What witnesses could you call, Mr. Mackay, to testify about this contract?

Mr. Mackay: To tell you frankly, Judge, we have [624] exhausted every possible means to find anything on it.

The Court: Well, you have the parties to the contract. Now, if I were to subpoena on the order of the Court the parties to this contract and ask them to testify about this contract, I think I would be exercising my duties as a judge very properly because I can't reach the question about which these three days of testimony has been given without first deciding whether there was a licensing agreement or whether there was a sale. And I doubt whether that is such a pure question of law that you can help me to answer that question merely by citing cases, certainly not just by citing tax cases, because every tax case in general stands upon its own facts. And when there is any dispute between the parties, of all things between the parties, a dispute as to the meaning of a contract, then it

would follow that the terms of the contract were ambiguous and that we had to go outside the four corners of this contract to properly construe the contract, and that is exactly the position that we are in because two taxpayers have taken a different position in reporting their income, and because the government is taking an inconsistent position.

Now, please don't misunderstand what I am saying. I am not trying to make this case any more difficult for myself, or for the reporter who is taking the transcript, but I would like to have your advice about whether some testimony [625] should be offered by the petitioner of the intent of the parties to this contract.

Off the record.

(Discussion off the record.)

The Court: On the record.

I would just like to say this: I have made my comment about the problem which, I think, is very important in this case, and I am going to take a recess, during which time we will also give some attention to the time for the filing of briefs. What I have said is by way of suggestion, and if any further time is required, is requested for the trial of this case I will grant that additional time. If no time for the further trial is requested, then I consider the parties now rest their case.

I would like to say that I think that counsel for both the petitioner and the respondent have done an extraordinarily fine bit of work in their presentation of this case, and that the harmony that has been shown, the patience, and the general good

feeling of counsel and also their clients is something that prompts me to say that I have enjoyed hearing this case.

Mr. Mackay: Thank you, your Honor.

The Court: But I am sorry that it is such a difficult case, and that I hope both taxpayers and the government are going to be well pleased with the results. [626]

Mr. Mackay: Thank you, your Honor. You have been very patient.

Mr. Neblett: Thank you.

The Court: Think about the time for the briefs.

Mr. Mackay: Yes, your Honor.

(Short recess.)

The Court: Mr. Mackay?

Mr. Mackay: If your Honor please, we have thought that over, and we feel that we have put in all the evidence that is available to us, and we are willing to stand on the record.

The Court: Very well.

Now, about the briefs, I am quite sure that with this very long record 45 days is not going to be enough time.

Mr. Mackay: No.

The Court: Mr. Neblett, I believe you argued the case in Seattle, did you?

Mr. Neblett: I tried the case up there.

The Court: Do either of you want to suggest alternate briefs?

Mr. Neeblett: I would like to suggest that.

The Court: You would?

Mr. Neblett: Yes, for two reasons, your Honor. I have to go back to Washington, D. C. right away, and, secondly, that will give me a chance to get back here. and if Mr. Mackay [627] writes his brief first it will give me something specific to attack, and we can meet the issue head on. I think that would be a very good way to treat this case.

The Court: If I allowed twenty days for the record to come in, and then 45 days for the first brief, will that be enough?

Mr. Mackay: That will be sufficient, I think, your Honor.

The Court: That will be 65 days from today.

Mr. Mackay: Yes.

The Court: When would the first brief be due?

The Clerk: September 24th.

The Court: Then if I allow 30 days after that——

Mr. Neblett (interposing): How many days?

The Court: Thirty. First brief due Seeptember 24th.

If your brief were due October 24th would that be enough time for you?

Mr. Neblett: If your Honor please, I would rather have more than 35 days; 45 days. It would just be 15 days extra, and I think it would be ample.

The Court: All right, 45 days from September——

The Clerk (interposing): November 8th.

The Court: November 8th, and then 30 days for a reply.

Mr. Mackay: I think we can get it within 30 days, [628] your Honor.

The Clerk: That is December 8th.

The Court: Make it December 10th.

Petitioner's reply brief Deecember 10th.

Mr. Neblett: That is splendid, your Honor.

The Court: Now, I would like to complete my work on this case so that the Court will have the results of both Judge Mellot's efforts and my efforts before it at the same time, but that case in Seattle was tried during the Spring, and so with this long time for the briefs Judge Mellot may feel that he wants to go right ahead and have his case considered just in order.

If there seems to be any advantage, I meean an objective way, the right way for these cases to be considered at about the same time by the Court, it might be necessary to file a motion. I don't know. On the other hand, if you feel that you would just like to let the chips fall where they may and have these cases just taken up in order as they are usually, why, we will let it go that way. I have a good many pending cases. I had practically a three weeks calendar in Detroit toward the end of May, and that would indicate that I wouldn't really complete my work on this case until the early part of next year.

So I am again thinking out loud, and I will say nothing further and just let you have the benefit of my [629] very candid expressions. I know that you understand that what I say I am saying because I have everyone's best interest at heart.

Mr. Mackay: Oh, yes, I am sure of that.

The Court: All right. If there is nothing further then, this concludes the hearing at this proceeding, and again I would like to thank you very much for a very interesting trial, the most interesting case I have heard for a good many years.

Mr. Mackay: Well, thank you, your Honor. We appreciate your patience.

Mr. Neblett: Thank you.

(Whereupon, at 6:45 p. m. the hearing was closed.)

Filed Aug. 13, 1945. [630]

In the United States Circuit Court of Appeals for the Ninth Circuit

T.C. Docket No. 4895

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

RAINIER BREWING COMPANY,
Respondent on Review.

STATEMENT OF POINTS

Come Now the Commissioner of Internal Revenue, the petitioner on review herein, by his attorneys, Sewall Key, Acting Assistant Attorney Gen-

eral, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and makes this concise statement of points on which he intends to rely on the review herein, to-wit:

1. The Tax Court of the United States erred in ordering and deciding that there is a deficiency in income tax for the year 1940 in the amount of only $149,548.89 and that there are no deficiencies in declared value excess profits tax and excess profits tax for the year 1940, and that for the year 1941 there is a deficiency in excess profits tax in the amount of only $15,338.15.

2. The Tax Court of the United States erred in holding and deciding that the amount received by the taxpayer in 1940, in the form of notes, for the right to use its trade names in a limited territory was not ordinary income, but constituted proceeds from the sale of a capital asset.

3. The Tax Court of the United States erred in failing and refusing to hold and decide that, as was determined by the Commissioner, the $1,000,000 in notes received by the taxpayer in 1940 pursuant to the exercise by the Seattle Brewing & Malting Company of the option granted under the contract of 1935 constituted ordinary income.

4. The Tax Court of the United States erred in holding and deciding that in computing taxpayer's adjusted basis for its good will the March 1, [1278] 1913, value of the taxpayer's trade names can only be reduced by such amount as taxpayer's predecessors received tax benefits therefrom, to-

wit, the amount of $138,137.40, and not by the loss, to-wit, $406,680.20, allowed by the Commissioner to the taxpayer's predecessor on account of the obsolescence in value of good will occasioned by the National Prohibition Amendment.

5. The Tax Court of the United States erred in holding and deciding that no part of the $1,000,000 received by the taxpayer for the right to use its trade names in the State of Washington and the Territory of Alaska was received in payment for its agreement not to compete with the Seattle Brewing & Malting Company in that territory and "that any value which the agreement not to compete had in 1935 had been exhausted when, in 1940, Century elected to exercise the option and purchase the exclusive and perpetual right to use the trade names in its business."

6. The Tax Court of the United States erred in that its opinion and decision are not supported by but are contrary to its findings of fact and the evidence.

7. The Tax Court of the United States erred in that its opinion and decision are contrary to law.

/s/ SEWALL KEY, CAR
Acting Assistant
Attorney General,
J. P. WENCHEL, CAR
Chief Counsel, Bureau of
Internal Revenue,,
Attorneys for Petitioner
on Review.

Statement of Service

A copy of this Statement of Points was mailed to A. Calder Mackay, Esq., 728 Pacific Mutual Bldg., Los Angeles 14, California, attorney for respondent on review, on January 21, 1947.

/s/ CHAS. E. LOWERY,

Special Attorney,
Bureau of Internal Revenue.

Received and filed Jan. 21, 1947. [1279]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes Now the Commissioner of Internal Revenue, the petitioner on review herein, by his attorneys, Sewall Key, Acting Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and complying with the rules of this court, pertaining to the designation of the portions of the record to be printed, states that he relies upon the entire record certified by the Clerk of The Tax Court of the United States, and directs

that said record so certified be printed as the record on review.

/s/ SEWALL KEY, CAR
Acting Assistant
Attorney General,
/s/ J. P. WENCHEL, CAR
Chief Counsel, Bureau of
Internal Rvenue,
Attorneys for Petitioner
on Review.

Statement of Service

A copy of this Designation of Portions of Record to Be Printed was mailed to A. Calder Mackay, Esq., 728 Mutual Bldg., Los Angeles 14, California, attorney for respondent on review, on January 21, 1947.

/s/ CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

Received and filed Jan. 21, 1947. [1280]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

Comes Now the Commissioner of Internal Revenue, the petitioner on review herein, by his attor-

neys, Sewall Key, Acting Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for the purpose of the review which he, the said petitioner on review, has heretofore taken to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates for inclusion in the record on review the following:

1. Docket entries of the proceedings before the Tax Court.

2. Pleadings:
   (a) Petition, including annexed copy of deficiency notice,
   (b) Answer,
   (c) Amendment to petition,
   (d) Answer to amendment to petition.

3. Findings of fact and opinion promulgated June 18, 1946.

4. Decision entered August 12, 1946.

5. Petition for review and notices of filing petition for review.

6. Stipulations of fact.

7. Official report of hearing before Tax Court on July 19, 20, and 21, 1945.

8. All Exhibits. [1281]

9. Order extending time for transmission of record.

10. Statement of Points.

11. Designation of Portion of Record to Be Printed.

12. This Designation.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

/s/ SEWALL KEY, CAR
Acting Assistant Attorney,

/s/ J. P. WENCHEL, CAR
Chief Counsel, Bureau of
Internal Rvenue,
Attorneys for Petitioner
on Review.

Statement of Service

A copy of this Designation of Contents of Record on Review was mailed to A. Calder Mackay, Esq., 728 Mutual Bldg., Los Angeles 14, California, attorney for respondent on review, on January 21, 1947.

/s/ CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

Received and filed Jan. 21, 1947. [1282]

The Tax Court of the United States
Washington

Docket No. 4895

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

RAINIER BREWING COMPANY,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 1282, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 7th day of February, 1947.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 11547. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Rainier Brewing Company, a corporation, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed February 15, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.